THE

LAW QUARTERLY REVIEW.

No. VIII. October, 1886.

THE GOVERNMENT OF IRELAND BILL AND THE SOVEREIGNTY OF PARLIAMENT.

THE Bill to amend the provision for the future Government of Ireland might almost be considered to have passed beyond the range of criticism but for three things. The constitutional importance of the issues involved was of the very first order; the difficulties of construction which the Bill presented were of a very peculiar character; and we are assured by the supporters of the Bill that we shall be compelled in time to accept a measure identical with it or resembling it very nearly. Indeed the Bill has exhibited a curious vitality even when it was declared to be, to all intents, dead; and a marked tenacity of its principal features even when we have been most vehemently assured of their obliteration.

The Bill was introduced as the future Magna Charta for Ireland: the permanence of its provisions was to be fenced about with all possible statutory safeguards. 'A Magna Charta for Ireland,' said Mr. Gladstone, 'ought to be most jealously and effectively assured, and it will be assured, against unhallowed and unlawful interference.' But, somehow, this Magna Charta was so battered by the storm of adverse criticism that when it came on for a second reading its critics and opponents were assured that, if they would only pass it, they would not be held to assent to any one single provision of the Bill, but only to an abstract resolution in favour of a legislative assembly for the management of Irish affairs.

If King John had been asked to assent to Magna Charta, not as committing him to matters of detail but as an abstract resolution in favour of constitutional government, he would probably have felt that the barons were only postponing the struggle till circumstances enabled them to insist on the precise terms of the Statute; and the opponents of the Bill no doubt exercised a wise discretion in refusing to accept, in the guise of a vague and general proposition,

an elaborate constitution, many clauses of which might well be regarded as the stepping stones to civil war.

The Bill was lost on the second reading, but in the minds of its promoters it would seem to survive with all its detailed provisions. Mr. Gladstone told us at Edinburgh that 'the Ministerial Bill is dead. The principle of that Bill survives. I certainly never will be guilty of the dishonesty of promising you without due consideration a new plan for giving effect to that principle.' The Bill therefore is not dead but sleeping, for Mr. Gladstone sticks to the principle and he sticks to the plan, and unless the two together make up the Government of Ireland Bill, words would seem to have lost their ordinary meaning. So we must regard the Bill as a thing which may again become matter of controversy; and it may be well to criticise some of its provisions while criticism is unaffected by strong political emotion. For it is not easy to fix attention on the legal construction of clauses while the country is ringing with cries of 'Justice to Ireland,' while men are wild with enthusiasm for the stupendous political genius of Mr. Gladstone in framing a Bill which they have not read, and with indignation at the iniquities of the Union of which they have only just been informed.

And yet the boon proposed to be conferred upon Ireland depended almost entirely upon the answer to two questions. What was the true construction of the Bill? Was that construction clear? On the answer to the first depends the nature and extent of the boon conferred; on the answer to the second, the likelihood that the boon will be enjoyed without bickering and contention.

Of all the points of construction which were likely to arise the most important are those which concern the relations between the proposed Irish Parliament and so much of the Imperial Parliament as was to be left. I propose to inquire whether these relations were clearly defined by the Bill, and how far the seat of sovereignty was ascertainable beyond dispute.

There are two marks or tests of a sovereign legislative assembly; they were clearly stated by Sir Henry James in the debate on the second reading of the Bill: they are, first, the power to make laws from which there is no appeal; and, secondly, the power to alter its own constitution: and the Government of Ireland Bill would seem to impair the sovereignty of the Imperial Parliament in both these respects.

It may be said that the clauses to which I am about to refer cannot or need not be construed as I propose to construe them. I shall endeavour to show that they cannot well be construed otherwise.

It may be said that even if they bear this construction they could

not affect the action of future Parliaments of Great Britain. I shall endeavour to show that they would have gravely affected the powers of the Parliament of Great Britain, or, as it may be convenient to call it, the Imperial Parliament [1].

In short, I propose to show that if the Bill did not contain provisions which its framers knew to be fallacious, it impaired the sovereignty of Parliament. If it did not impair the sovereignty of Parliament, then § 37 and § 39 were meaningless, if not delusive.

In considering the effect of the Bill in this matter we have to deal with legislation of two sorts, the making of law for general purposes, and the making of law for the alteration of the constitution proposed to be conferred upon Ireland. It will be well to keep these separate and to deal first with legislation for general purposes.

For general legislation we have two legislative assemblies, the Queen in Parliament, and the Queen in the Parliament of Ireland. The powers conferred upon the latter assembly were general powers subject to special exceptions; and as to the excepted matters, § 37 of the Bill proposed to enact that the authority of the Imperial Parliament should be in no wise diminished or restrained. If a question arose on the validity of any Bill passed by the Irish Legislative Body, it was to be referred to the Judicial Committee of the Privy Council under the provisions of § 25.

Now supposing the Irish Parliament to legislate within the general powers conferred by the Bill, and the Imperial Parliament, for reasons of its own, to pass a law upon the same subject, differing in effect from the Irish Act and intended to have force in Ireland; would the Judicial Committee of the Privy Council have to decide whether an Act of the Imperial Parliament or an Act of the Irish Parliament was to prevail in Ireland?

The question seems somewhat startling, but a consideration of the terms of the Bill will show that the validity of the Irish Act as against the Imperial Act would be at any rate an arguable proposition. Let us look at the provisions of the Bill. § 3 contains the subjects excepted from the legislative powers of the Irish Parliament, and § 4 the subjects on which its powers are restricted; and we may pass to § 37, which runs thus:—

'37. Save as herein expressly provided, all matters in which it is not competent for the Irish Legislative Body to make or repeal laws shall remain and be within the exclusive authority of the Imperial Parliament save as aforesaid, whose power and authority in relation

[1] Lord Stanhope in the Life of Pitt (iii. 230) tells us that the title 'Imperial' was first given to our Parliament when the Irish members joined it after the Act of Union. The word as used in the Bill to describe a Parliament from which Ireland is excluded must be used carelessly or from a design, which seems to run through the Bill, to make things seem other than they are.

thereto shall in no wise be diminished or restrained by anything therein contained.'

The section needs analysis, and one may put the meaning of it as follows. Legislation, as contemplated by the Bill, may be of three sorts:—

(1) Matters about which the Irish Legislative Body is competent to make or repeal laws.

(2) Matters about which this body is not competent to make or repeal laws; such matters are to be within the exclusive authority of the Imperial Parliament.

(3) Matters contemplated by the words '*save as herein expressly provided.*' These are matters beyond the competence of the Irish Parliament and yet *saved by express proviso* from the 'exclusive authority' and undiminished power of the Imperial Parliament.

It will be desirable to leave (3) for future consideration. I shall be able to show that it refers to alterations in the Irish constitution.

The clause mainly deals with ordinary legislation, and would seem to be objectless unless it was supposed that the powers of the Imperial Parliament would be in some way affected by the Bill. There were some subjects on which the Irish Parliament might legislate, and others on which it might not. As to those on which it might not legislate the powers of the Imperial Parliament are declared, with the exception above mentioned, to be undiminished. The inference seems irresistible that in the contemplation of the framers of the Bill those powers *were* diminished in respect of matters on which the Irish Parliament *might* legislate.

Mr. Bryce, it is true, spoke in the House of Commons as if this matter was wholly free from doubt. He said: 'While the ultimate right to legislate will reside in, and will in the main be exercised by the Imperial Parliament, we shall have conceded to the Irish Parliament the right to legislate on subjects upon which we do not intend ourselves to exercise the right of legislating. *This is exactly what we did with our colonies.*' But this is not exactly what we did with our colonies, for in the Colonial Laws Act, 1865, there is an express reservation of general legislative power in favour of the Imperial Parliament. It ran thus:—

Sec. 2. 'Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.'

The argument is reducible to this. If it was meant to reserve general legislative power to the Imperial Parliament, there were two courses open to the framers of the Bill. Firstly, they might have accepted the theory of Mr. Bryce (of which I shall have something to say later on) that Parliament cannot divest itself of its sovereignty; they might have left out all mention of the reserved authority of Parliament, and it might have been said, and perhaps believed, that the sovereignty of Parliament was so inalienable and indefeasible that any reference to it in the Bill would be mere surplusage. Or, secondly, there might have been an express reservation of Imperial sovereignty as in the Act of 1865.

But the framers of the Bill did not adopt either of these courses; they gave to the Irish Parliament general legislative powers, subject to certain special exceptions, and as to these excepted matters they declared that the authority of the Imperial Parliament was 'in no wise diminished or restrained,' except as in the Act expressly provided. It seems almost impossible to say that § 37 does not cast some doubt on the right of the Imperial Parliament to legislate for Ireland in such matters as are not withdrawn from the competence of the Irish Parliament.

Let us suppose a case. The Irish Parliament legislates on the relation of landlord and tenant in a way which the British or Imperial Parliament regards as economically unsound or morally unjust. There would be two ways of preventing such legislation from taking effect.

The British Parliament might address the Queen to instruct the Lord Lieutenant to veto the Bill; or it might pass an Act for Ireland designed to counteract the effect of the Irish Act.

In the first case the collision between the two assemblies would be abrupt and immediate; the ministers of the Crown in England and in Ireland would of necessity be found advising the Crown in two different ways; and the Queen would have to choose between her Irish Ministers and her Irish Parliament on the one hand, and her English Ministers and her British Parliament on the other.

In the second case the collision might not be immediate, but sooner or later litigation would arise in which the construction of the conflicting Statutes would come for decision before the Irish Courts. If Mr. Gladstone's anticipations as to the constitution of the Irish Bench are realised, there can be little doubt that an Irish Judge would decide in favour of an Irish Statute. An appeal would lie to the Judicial Committee of the Privy Council, and there could be no doubt of the competence of an Irish Parliament to make a land law for Ireland. But the validity of the Irish Act would

have depended on the answer given to the question whether the British Parliament on a fair construction of § 37 was competent to make a concurrent land law for Ireland, overriding the Act of the Irish Parliament.

There would be some novelty in the spectacle of an English Court considering an Act of Parliament, not as regarded its construction, but as regarded its validity; but if the Bill for the better government of Ireland had become law, the Judicial Committee might have been called on to decide whether the Imperial or British Parliament, in legislating for Ireland on the relations of landlord and tenant, had not exceeded the powers which (as the Imperial Parliament) it had retained under § 37.

§ 37 seems therefore to infringe that part of the sovereignty of the Imperial Parliament which consists in the power of making laws for which there is no appeal.

The answer given to this contention by the supporters of the Bill comes in substance to this; that there is an inalienable sovereignty in the Imperial Parliament; that although the Bill seems to confer independent powers on the Irish Legislature, it does not do so; that although the Imperial Parliament is made to look as though it abandoned some portion of its sovereignty, it in fact abandons nothing; that although it specially reserves to itself power to legislate on certain subjects, the reservation is meaningless since it can legislate upon all.

But, they seem to say, let us make the Irish Parliament look as sovereign as possible, and let us assume that its legislation will always be beneficent, and that even if this should not be so the Imperial Parliament will do well not to interfere. These last grounds of argument are matter of politics rather than of law. But granted that Mr. Bryce's construction is the true one, there remains an objection which a lawyer may fairly urge; it is that the Bill was drawn to look something other than it was meant to be, to seem to renounce powers on the part of the Imperial Parliament which were not intended to be renounced, to seem to confer powers on the Irish Legislature, absolutely, which were intended to be conferred with a reservation.

So far I have tried to show that, on a fair construction of § 37, if the Imperial and Irish Parliaments made laws, concurrent and conflicting, on matters within the competence of the Irish Legislature, as contemplated by the Bill, it might be argued that the Imperial Parliament had divested itself, if it could divest itself, of its legislative powers. Whether it can do so is a matter to consider presently; but now let us deal with § 39.

As § 37 casts a doubt on the power of the Imperial Parliament to legislate without appeal, so does § 39 cast a doubt on the power of the Imperial Parliament to alter its own constitution.

We must look back for a moment to § 37. That section reserves to the Imperial Parliament an undiminished authority to deal with those matters which are excepted from the competence of the Irish Parliament; but there is a reservation within this reservation, and it is indicated by the words 'save as herein expressly provided.' A brief study of the Bill interprets this saving. Among the restrictions on the power of the Irish Legislature we find that it 'shall not make any law .... affecting this Act, except in so far as it is declared to be alterable by the Irish Legislature.' And § 39 lays down express rules for the alteration of the proposed Act. Here then is a matter as to which the Bill seems in the most distinct terms to limit the powers of the Imperial Parliament.

There are certain matters, those included in §§ 3 and 4, as to which its authority is declared to be undiminished and unrestrained '*save as herein expressly provided*.' One of those matters is the alteration of the proposed Act, and as to this it is *expressly provided* as follows:—

'39. (1) On and after the appointed day this Act shall not, except such provisions thereof as are declared to be alterable by the Legislature of Ireland, be altered, except—

'(*a*) by Act of the Imperial Parliament and with the consent of the Irish Legislative Body testified by an address to Her Majesty, or

'(*b*) by an Act of the Imperial Parliament, for the passing of which there shall be summoned to the House of Lords the peerage members of the first order of the Irish Legislative Body, and if there are no such members then twenty-eight representative peers elected by the Irish peers in manner heretofore in use, subject to adaptation as provided by this Act; and there shall be summoned to the House of Commons such one of the members of each constituency, or in the case of a constituency returning four members such two of those members, as the Legislative Body of Ireland may select, and such peers and members shall respectively be deemed, for the purpose of passing any such Act, to be members of the said Houses of Parliament respectively.'

For ordinary legislation we had only two bodies to consider, the Irish Parliament and the Imperial Parliament. For the purpose of altering the proposed Irish constitution, the Magna Charta of Ireland as Mr. Gladstone hopefully termed it, we have to consider three bodies: the Irish Parliament; the Imperial Parliament reinforced by the addition of 28 representative peers and 52 of the

104 members constituting the second order of the Irish Legislature; and the Imperial Parliament.

The powers of the Irish Parliament in this respect may be briefly dealt with.

It is prohibited by § 4 from making any law 'affecting this Act, except in so far as it is declared to be alterable by the Irish Legislature.' But § 39 enables it to take part in the alteration of the constitution in two ways.

(1) It may by an address to the Queen signify its consent to a proposed change in the constitution. This would enable the Imperial Parliament to act in the matter without the co-operation of Irish peers and members. But Mr. Gladstone intimated that alterations thus effected would be 'alterations of detail on which everybody might be agreed.'

(2) In the event of a material alteration being found necessary, in the event of the composite body above described being called into play, the Irish Parliament was to determine which one of the two members of each constituency, or which two members of any constituency returning four members, should be summoned to the Imperial Parliament.

This is an important provision, for the members were not to be summoned until selected, so that the Irish Parliament might postpone for a very considerable time a proposed change in the Irish constitution by a mere delay in the selection of those who should represent it in the Imperial Parliament.

Beyond this, the Irish Parliament was to be restrained by § 4 from dealing with the Magna Charta of its constitution; and we may now turn to the second of the three legislative bodies who might be entitled to meddle with this sacred document.

The powers of the composite body provided by § 39. subs. 2 for the purpose of reconstructing the Irish constitution were unlimited. It might no doubt by a repeal or modification of the proposed Act have reconstructed the Imperial Constitution by restoring the Irish members, either unreservedly or for certain purposes, to the Imperial Parliament.

There remains the Imperial Parliament: and the most important consideration presented by § 39 read in connection with § 37 is the power left to the Imperial Parliament to alter the Irish Constitution. It is clear that § 39 forbids alteration except in the manner provided by that section; and it is equally clear that § 37 contemplates a diminution and restraint in this respect of the power and authority of the Imperial Parliament. This is the plain meaning of the words 'save as herein expressly provided.'

Has then the Imperial Parliament, or so much of it as the Bill

leaves in existence, an inherent sovereignty which would enable it, legally, to alter the Irish Constitution without an address from the Irish Legislative Body, and without a summons of Irish peers and representatives? No candid reader of the sections to which I have referred would deny that without recourse to such a theory of the inherent and inalienable sovereignty of Parliament the terms of the Bill precluded alteration except in the manner prescribed by the Bill.

This theory is stated with the utmost clearness and precision by Mr. Bryce. 'We have the right,' he says, 'to legislate for Ireland, and we shall have it when the Bill becomes an Act. We shall retain as a matter of right the power to legislate for Ireland for all purposes whatever, *for the simple reason that we cannot divest ourselves of it*. There is no principle more universally assented to than the absolute omnipotence of Parliament, because there is nothing beyond us or behind us. . . . There is one limitation and one only upon our omnipotence, and that is that *we cannot bind our successors*. If we pass a statute annihilating our right to legislate it may be repudiated by our successors.'

The case in favour of the competence of the Imperial Parliament to alter the Irish Constitution without reference to the terms of the Bill is nowhere more clearly stated than in the foregoing extract from Mr. Bryce's speech. But to the argument thus stated it is possible to make two answers.

In the first instance, I would venture to urge that in all matters of business, and especially in the drafting of statutes, it is desirable to say what you mean, and to make words and intention correspond as precisely as the imperfections of language permit. Here is a Bill of the utmost constitutional importance; designed, as its supporters proclaim, to compose the differences of races and to avert anarchy and civil war; it alters the composition of the Imperial Parliament, creates a Parliament for Ireland, and re-constitutes the Irish Executive; it contains an express provision that it is only alterable by a certain specified procedure, and that provision is so worded as to convey an irresistible impression that the authority of the Imperial Parliament is thereby diminished and restrained.

But we are told that it is immaterial what provisions the Bill may contain, and that the Imperial Parliament must remain sovereign as heretofore. So that when § 37 enacts that as regards certain matters of legislation the power and authority of the Imperial Parliament is in nowise diminished or restrained, we are to understand that it is equally undiminished and unrestrained in respect of all other matters; and when the same section makes express provision for the restraint and diminution of the powers of the Imperial

Parliament and § 39 lays down the mode in which those powers are to be restrained, we are to understand that the proposed mode of altering the Irish Constitution is merely a suggestion to be made by the Parliament of 1885, which a subsequent Parliament may adopt if it pleases; or, if it pleases, may treat as waste paper.

These two sections seem to deal with two matters of the highest importance, the legislative competence of the Irish and Imperial Parliaments respectively and the mode of altering the Irish Constitution; but according to the best explanation vouchsafed to us on the subject they would seem to do no more than serve the purpose of the Apocryphal books of Scripture, they are for 'an ensample of life and instruction of manners' to future Parliaments, but are of no binding force whatsoever.

This follows if we can agree with Mr. Bryce that the Imperial Parliament can divest itself of the Irish representation without divesting itself of the legal right to legislate for Ireland in contravention of the express or implied terms of the Bill. I should be disposed to combat this proposition, which lies at the root of the whole discussion. It is said that the Imperial Parliament cannot bind its successors, that what one Parliament may enact another Parliament may repudiate. But if the Irish Government Bill had become law the Parliament of 1885 would have had no successors. It met as the Parliament of the United Kingdom of Great Britain and Ireland; if the Bill had become law that Parliament would have ceased to exist, and the assembly sitting at Westminster would have been the Parliament of Great Britain only. A repudiation of the Acts of the Parliament of 1885 by such an assembly would not have been a repeal by one Parliament of the Acts of another Parliament similarly constituted; it would have been a repeal of the Act of a Parliament in which Ireland *was* represented by a Parliament in which Ireland *was not* represented.

This is not a question of good faith or of constitutional propriety, it is a question of legislative capacity. We may search our constitutional history for authorities, but we can only find one that seems to give us any assistance.

The colonial constitutions are here irrelevant. In the case of the colonies large powers were given to subordinate bodies, while the legislative sovereignty of the Imperial Parliament was expressly retained. Nor can it be said that changes in our representative system affect the competence of a reformed Parliament to deal with the legislation of its predecessors. No one would contend that the Government of Ireland Bill was *in pari materia* with an Act which increased the numbers of the electorate and re-adjusted the constituencies.

But the dealings with Ireland in 1782 and 1800 do furnish some sort of precedent, and it may be of use to see whether this inalienable sovereignty of Parliament was thought to exist between the repeal of 6 Geo. I. c. 5 and the Act of Union.

Before 1782 Ireland had a Parliament which was kept in a state of dependence in two ways: by the Declaratory Act, 6 Geo. I. c. 5, which asserted the right of the British Parliament 'to make laws and statutes of sufficient force and validity to bind the kingdom and people of Ireland;' and by the control exercised over the matter and form of Irish legislation by the executive of the two countries, the privy councils of Ireland and of Great Britain.

The British Parliament of 1782 dealt so far as it could with both these causes of dependence. It repealed the Declaratory Act, and addressed the Crown recommending that the executive restrictions on Irish legislation should be removed. The King acceded to this request, and in pursuance of it gave his assent to Bills of the Irish Parliament which repealed the perpetual Mutiny Act, and secured that Irish legislation should be independent of everything save the royal veto.

But what I am mainly concerned with here is the repeal of the Declaratory Act. By this repeal the British Parliament professed to hand over its legislative sovereignty to the Irish Parliament, thereby enacting in effect that it no longer 'had, hath, and of right ought to have full power and authority to make laws and statutes of sufficient force and validity to bind the kingdom and people of Ireland.' The Parliament of Ireland was, up to the passing of this repeal, in the position of a subordinate law-making body, subordinate to the sovereign Parliament of Great Britain; nor was this subordinate condition disputed. The repealing Act of 1782 made the Irish Parliament co-ordinate with the British Parliament, an independent law-making body, so independent that when the Regency question arose in 1788, 'it was accident alone,' so said Mr. Pitt, 'that preserved the identity of the executive power:' so independent, that, to quote from the same authority, 'the distinct powers possessed by the two legislatures on all the great questions of peace and war, of alliances and confederacies,' made it possible that 'on these important questions the opinions and decisions of the two Parliaments might have been at variance[1].'

An Act of the British Parliament was capable of raising the Irish Legislature from complete dependence to complete independence, so far as concerned the powers of the British Parliament. But if we are to accept the theory that under no circumstances can a Parliament bind its successors, this independence of the Irish Parliament

[1] Parliamentary History, vol. 34, pp. 265, 266.

might have been brought to an end by a simple re-enactment of the Act of George I.

Yet in introducing the resolutions on which was based the action of Parliament and the Crown in 1782 neither Mr. Fox nor Lord Shelburne suggested that the British Parliament would retain the legal right to legislate for Ireland. It is true that those distinguished men lived before the days of Austin and had not the advantage of the assistance of Professor Dicey's 'Law of the Constitution.' But they had Blackstone's Commentaries, and Blackstone is clear on two points.

'As to Ireland,' he says, 'that is still a distinct kingdom, though a dependent and subordinate kingdom:' and Fox and Shelburne proposed by Act of Parliament to make Ireland an independent kingdom. But Blackstone further says, 'Acts of Parliament derogatory from the power of subsequent Parliaments bind not.' Yet Fox and Shelburne never brought this comforting proposition to the notice of the British Parliament.

They clearly intended to concede legislative independence to Ireland beyond recall. 'Mr. Fox said that as it was his intention to do away completely with the idea of England legislating for Ireland, so he should have no objection to word the repealing Act in such a manner as to contain a specific renunciation of the right claimed by this country to legislate for Ireland[1].'

Nor did the statesmen who brought about the Act of Union maintain that the British Parliament had retained any sovereignty over Ireland after 1782. Nobody, in fact, seems to have thought that Blackstone's proposition applied to cases where an independent legislative body was created. If this proposition had been applicable we should have found among the advocates of the Union some one to say that it was within the power of the British Parliament to make laws for Ireland, and so to incorporate the Irish and British Parliaments whether the Irish would or no. But the language of the ministers in the debates on the Union shows that they considered themselves absolutely bound by the repealing Act of 1782. 'I am ready to admit,' said Mr. Dundas, 'that by the transactions of 1782 the Irish Parliament is placed on the same footing of independence in relation to Great Britain as Scotland was with regard to England before the union of the two kingdoms.' Mr. Pitt held language pointing to the same conclusion. 'By the repeal of the Declaratory Act,' he says, 'the power of the British Parliament of making laws for Ireland was given up[2].' He does not add, 'so far as was consistent with the inalienable, indefeasible sovereignty of Parliament.'

[1] Parliamentary History, vol. 23, p. 33.

[2] Ib., vol. 34, p. 345.

Yet the Act repealing the Declaratory Act was a much simpler matter than the Government of Ireland Bill. It contained no provision similar to § 39 of that Bill. It was not fenced about with any statutory safeguards against a revival of the exercise of legislative rights by the British Parliament. If there is anything in the theory of inalienable sovereignty set forth by Mr. Bryce and Mr. Gladstone[1], the British Parliament might at any moment have resumed its legislative power, the Act of Union might have been passed without any reference to the Parliament of Ireland, and Mr. Pitt and his colleagues must have been ignorant of a rudimentary proposition of constitutional law.

But the argument against Mr. Bryce's theory seems stronger in the case of the Government of Ireland Bill than in the case of the repeal of the Declaratory Act. In the latter the British Parliament by its own act conferred independent legislative powers upon an assembly previously dependent; in the former the Imperial Parliament cuts itself in two and assigns to each part its respective rights and duties. There is a difference between a sovereign body dealing with a subordinate body, and a sovereign body dealing with itself, dividing itself, and determining the conditions of the separation. There is a difference, I say, but the difference is not in favour of Mr. Bryce's theory.

The rights and duties of the two parts into which the Parliament is severed need to be settled once for all in the Act which provides for their separation, and if the flexibility of our constitution is to be preserved, if the offshoot of the Imperial Parliament is intended to be subordinate, the Act must definitely retain for the Imperial Parliament the power to alter, when and how it pleases, the constitution of the subordinate body. We can test the theory of inalienable sovereignty best by speculating upon a further development of its application.

If the Government of Ireland Bill had become law, and the success of the measure had exceeded common anticipation, it is conceivable that Scotland might have demanded a similar constitution and that Wales at no long interval might have desired to be placed on the same footing. Would a Parliament in which England alone was represented have retained an indefeasible right to legislate for Scotland, Wales, and Ireland? If not, one is inclined to ask at what precise point the theory would break down. If it is good for one it is good for all.

In truth the Bill for the Government of Ireland was a treaty

[1] See Mr. Gladstone's speech at the Foreign Office; *Times* newspaper for Friday, May 28th.

which both parties might agree to vary, or which one party might determine to break, but which, while it endured, would substantially alter for one part of the Queen's dominions the character of our Constitution. Flexible elsewhere, that Constitution would become rigid as regarded the relations of Ireland to the Empire. Omnipotent as the Imperial Parliament would be for all other purposes, it would be bound by the words of § 39 not to alter the Irish Constitution except as provided by the Bill: possibly also it might be bound by the words of § 37 not to legislate for Ireland on any topics but those set out in §§ 3, 4. The Act for the Government of Ireland would be a written Constitution to which might be referred every Act of the Imperial Parliament professing to deal with Ireland or Irish affairs. For the statement that Parliament cannot bind its successors may be taken to be true, subject to two exceptions. The first of these is where Parliament surrenders its sovereign powers over a certain area to another person or body. It seems difficult to contend that a Sovereign cannot abdicate his powers, in favour of another, so as to make him legally incapable of exercising them. And, if a Sovereign can abdicate his sovereignty altogether, or cede it in part, it matters nothing in theory whether the Sovereign is an individual or a composite body. Does it then matter in practice? Suppose that legislative independence were to be conceded to the colony of Victoria. Suppose that Parliament were to repeal the Colonial Laws Act as regarded that colony, and the provisions of any other Acts which effected the subordination of the Victorian Parliament, and that all necessary steps were taken to place Victoria in the position in which Fox desired to place Ireland. Would it be maintained that our Parliament could still legislate for Victoria, or that the Victorian Courts need regard such laws as anything but specimens of legislation instructive perhaps, but certainly inoperative?

I should be disposed to contend that Parliament could only regain its powers in one of two ways. Acts passed by the Parliament of Victoria and the Parliament at Westminster might provide for a legislative re-union of the two countries on any terms to which both could agree. Or war and the suspension for a while of all legal relations might leave Victoria in the position of a conquered territory with which the Imperial Parliament could deal as it pleased.

The second exception would be found in the case of such a transaction as was contemplated in the Bill before us, where two portions of a people heretofore represented in a Common Parliament agree to have separate legislative assemblies. The terms of their separation must then provide that one shall be subordinate to the other, or that both shall be independent, or that both shall be

subordinate to the articles of their separation and to the written constitution so created.

I venture to think that I have shown reasons why, if it was the intention of the framers of the Bill to retain the sovereignty of Parliament, it would have been common prudence to introduce a clause similar to that contained in the Colonial Laws Act, and to have made it apparent on the face of the Bill that the residue of the Imperial Parliament claimed a right to legislate for unrepresented Ireland. But it would seem that the framers of the Bill were not specially anxious that its full meaning should be obvious at the first perusal. One or two instances will suffice.

It naturally occurs to an inquirer into the legislative procedure proposed for Ireland that provision must be made somewhere for the exercise of the one legislative function of the Crown in Parliament, the giving or withholding the royal assent to a Bill. It would not occur to such an inquirer to look for such a provision under the heading 'Executive Authority.' And if he did look for it there, he would have to look pretty closely. The arrangement of clauses runs thus—

'Executive Authority.

'7. Constitution of the Executive Authority.
'8. Use of Crown Lands by Irish Government.'

Who would suppose that the rights of the Crown in respect of legislation were hidden away in a subsection of the clau e entitled 'Constitution of the Executive Authority?' Yet so it is. The royal veto is almost as carefully concealed as the sovereignty of Parliament.

Again, the Judicial Committee of the Privy Council is to pronounce on the constitutional questions arising as to the powers conferred on the Legislature of Ireland; but if the Privy Council should decide against an Act of the Irish Legislature, there is no machinery for carrying out its decrees except the Irish Executive. Without imputing to the contemplated Irish Executive 'a double dose of original sin,' its dependence on the Irish Legislature would have made it a somewhat unsuitable machine for the enforcement of judgments based on the assumption that the Irish Legislature had exceeded its powers.

I have purposely confined myself to the general relations which it was proposed to establish between the Irish and the so-called Imperial Parliament, and the effect of the Bill in connection with the theory of Parliamentary sovereignty. It is not within the purport of this essay to point out the constitutional anomalies with which the scheme abounds, still less to criticise the proposal to

establish a separate legislative assembly for Ireland. What I do wish to point out is the importance to the two countries, if they *are* to have separate Parliaments, of a precise definition of the powers of those Parliaments respectively. It might be possible to produce a more unworkable measure; it would be hard to produce a less straightforward one. For what else can one say of a measure in which the sovereignty of the Imperial Parliament is arrived at by an innuendo, in which the royal veto is only discoverable after a game of hide and seek, in which powers absolutely illusory are conferred on the judicial body which is designed to arbitrate between the two Parliaments. The constitution proposed for Ireland was neither a colonial nor a federal constitution, but contained some features of both in a blurred and imperfect form. Mr. Bryce treated it as providing for Ireland institutions similar to those of our colonies, but the powers conferred were far narrower than the legislative powers granted to our colonies, while, so far as they went, their subordination to the Imperial Parliament (if it existed) was sedulously veiled. The position assigned to the Judicial Committee of the Privy Council carries with it the suggestion of Federation, but there was no provision for the representation of federated Ireland in the Imperial Parliament, nor any machinery for carrying out the judgments of the Court which was to do duty for the Supreme Court of the United States. It is to be hoped that any future scheme for the better government of Ireland will not halt in this way between irreconcileable forms of constitution.

Such a scheme, if it is not to involve Separation, must be on one of three lines, colonial, federal, or in the direction of an extension of local government.

If it is to be colonial, it must carry with it wide powers of legislation and distinct subordination to the Imperial Parliament. It may be said that Ireland is too close to us for a grant of such powers, and too much a part of ourselves to accept the position of a subordinate dependency; but this is not for me to discuss.

If it is to be federal, we must accept *pro tanto* a rigid instead of a flexible constitution, we must have a judiciary to interpret its terms and an executive to enforce the judgments pronounced; above all, we must have a continuous representation of federated Ireland in the Imperial Parliament. The scheme suggested, when the Bill was in the agonies of its moribund state, for bringing over some of the Irish members on a sort of imperial or financial excursion to the British Parliament, hardly needs serious consideration.

Thirdly, there is the extension of local government. The construction of a graduated system of local bodies would be a work of time; it would not probably be embodied in one Bill; and, if it

were, such a Bill would not excite enthusiasm in the Nationalist party or attract the attention of the civilised world. To frame and endeavour to work institutions which would give political education to a whole people is a slow, painful, and thankless task: it is certainly easier and productive of more immediate applause to embody a whole constitution in a single Bill. Without pronouncing on the conflicting merits of the different schemes, I would only offer a humble appeal to our legislators, that, when next they take to constitution-making, they will first get clearly before their minds what sort of constitution they propose to make, and then will take care that its terms are precisely set forth in the Bill in which it is to be embodied.

W. R. Anson.

ORAL WILLS AND DEATH-BED GIFTS.

THERE is a close and perceptible analogy between those testamentary dispositions by word of mouth to which our law gives the name of nuncupative wills and the death-bed gift or *donatio causâ mortis*. We borrow these two kinds of transfer from the Roman jurisprudence, but without those safeguards against fraud and error, at the outset, which surrounded them in the age of Justinian.

The latter kind of disposition involves, of course, a delivery upon condition by the dying owner, while the former does not. Yet both will and gift are in effect testamentary, revocable until death, otherwise operating a transfer when death happens; both may affect personal property of every description, though not real estate; each by the rules of the common law, apart from legislation, is manifested by the loose, unwritten and often conjectural words uttered by the decedent in favour of his beneficiary; both jeopardize and detract from the more positive rights of legatees and kindred, as designated by some will already written out and deliberately executed, or the statute of distribution; and in most respects the circumstances and surroundings of the two transactions are identical. That secret coercion and fraud which the curtain of death so often invites by its concealment; those hopes, wishes and jealousies which they who smooth the dying man's pillow are so careful to mask from one another; that sudden and unexpected opportunity by which a bystander of callous conscience is so sorely tempted; that degeneration of mind in the sick man which so often accompanies bodily disease at the approach of death; and the liability, moreover, to misinterpretation to which every one must needs expose himself when disposing of his goods informally, while *in extremis*:—all these incidents of oral disposition at life's last stage impressed English judges and legislators more than two centuries ago. Public policy both in England and the United States restrained and at length fairly ostracized the nuncupative will; and it insists more earnestly at this day than ever before, that every testamentary disposition shall be in writing, subscribed by the testator, and duly witnessed by competent persons in order to take legal effect. But the gift *causa mortis*, on the other hand, strange to say, has within these last two centuries gained and strengthened its footing steadily; aided by the vast expansion of modern wealth in personal property, and the increasing dis-

position of our courts of equity to relax the formalities of legal assignment and transfer in those incorporeal kinds which modern business has created. Frauds and perjuries are carefully prevented in the one class of oral transfers but not in the other. Two witnesses (or three under some of the American codes) must now attest the signature of a testator, and all wills as a rule must be in writing; while a gift *causa mortis* may be established in proof on the testimony of a single witness, as to loose words and acts of the donor, provided his testimony, however perjured, remains unimpeached.

Let us briefly compare these two classes of death-bed dispositions. The nuncupative will, which appears to have maintained a good footing at our common law before the general cultivation of letters, rested for its validity upon an oral nuncupation. The essence of this nuncupation consisted in a verbal declaration of his last wishes by the testator himself in the presence of witnesses. How many witnesses the Anglo-Saxon law required on such occasions is not clear; certainly not seven, as under the Roman code; probably not even two, the number fixed by civil rules of evidence for proving a controverted fact; for a single unimpeached witness might, according to our common law, establish an oral transaction[1]. By the time of the Stuarts a nuncupative will was usually, if not invariably, made in the extremity of death; though not perhaps so strictly confined in the earlier days of our law. The testator's verbal declaration was seldom reduced to writing on the spot; for had it been, the adoption of what was written would have made his will more than nuncupative in point of formality. After the testator's death, it was customary for a statement to be drawn up from memory, embodying the disposition of his effects as the decedent was supposed to have made it; this statement the witness or witnesses signed, and the will was then ready to present for probate.

In short, the nuncupative testament was a will established by hearsay, and not from any writing seen and sanctioned by the person who pronounced it. 'A nuncupative testament,' says Swinburne, 'is when the testator, without any writing, doth declare his will before a sufficient number of witnesses. It is called nuncupative, because, when a man makes such a testament, he must name his executor[2], and declare his whole mind before witnesses[3].'

[1] Nuncupative wills of the present day, those of soldiers for instance, have been established on the testimony of a single witness, as in the case of a gift. See *Gould* v. *Safford*, 39 Vt. 498.

[2] The idea prevalent in Swinburne's day, that the naming of an executor was essential to a will, has been long since discarded in modern practice.

[3] Swinburne, pt. 1. § 12.

Perkins, a still earlier writer, whose treatise was published under Henry VIII, defines a nuncupative will as properly made when the testator 'lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and, therefore, he prayeth his curate, and others, his neighbours, to bear witness of his last will, and declareth by word what is his last will[1].' This latter statement gives us, perhaps, a vivid picture of the nuncupation under the most fitting and urgent circumstances, rather than a careful definition of the limits by which such dispositions were necessarily bounded; for the common law seems never to have prescribed that the opportunity to write a will should be wanting, and still less that one's curate and neighbours should be summoned as indispensable witnesses of the solemn scene.

Now, to speak of the gift *causa mortis*. Let us imagine as the donor this same decedent who 'lieth languishing for fear of sudden death;' not of necessity declaring his wishes, however, in presence of vigilant and disinterested witnesses, but in the act, well attested or otherwise, of parting possession with his personal property. Possession is received by or on behalf of his intended donee. In order to stand, such a transfer should be accompanied by a free and intelligent delivery of the thing on the part of the owner while *in extremis*, with words signifying his intention that the gift shall take effect when he dies; and yet the supposed beneficiary might have taken the thing stealthily or extorted it, or appropriated it under some fraud or misconception of what the dying owner really intended, if indeed the latter had a rational purpose at all. As in the oral will, the decedent declares by word of mouth what he intends; or rather, he makes a sort of specific legacy to another by oral words accompanied by that act, so easily misconstrued or misrepresented under such circumstances, namely, a delivery of the chattel conditional upon death. We may define the gift *causa mortis* thus: it is a gift of personal property, made by a party in the expectation of death then imminent, and upon the essential condition that the property shall belong fully to the donee in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not meantime revoked, but not otherwise[2]. Such is the doctrine of death-bed gifts as a topic of our Anglo-Saxon law.

To contrast, then, the policy which English and American experience has built up during the past two centuries, with reference to these separate but similar dispositions of the testamentary kind; the one with a parol declaration before bystanders as its chief element, the other with a parol delivery rather, which regards

[1] Perkins, § 476.

[2] Schoul., Pers. Prop., 2nd Ed., § 135.

the donee more than any bystander; and both modes liable unquestionably to perjury and misconception. Upon nuncupative wills the statute of 29 Car. II (1676–77) set its broad seal of disapproval; and the 'frauds and perjuries' incidental to all oral dispositions in the nature of a testament was one of the objects which that famous enactment sought to supersede. In this statute the practice of revoking and altering written wills by unwritten ones was utterly discountenanced. Except for soldiers in actual military service and mariners at sea, no nuncupative will bequeathing property of more than £3 value was thenceforth permitted: (1) unless proved by three witnesses, at least, who were present when the will was made; (2) unless a nuncupation, by the testator, such as bidding those present to witness that this was his will, etc., could be proved; (3) unless, with stated exceptions, the will was made not only in the last sickness but at the testator's own home; (4) unless the substance of this will was reduced to writing within six days after the nuncupation[1]. In other words, the nuncupative will should thenceforward be well witnessed, the nuncupation clearly expressed, the exigency pressing, all the surroundings of the act favourable to its due and discreet performance, and the nuncupative words themselves reduced to writing while the recollection of the witnesses was fresh. But English legislation did not cease even with these safeguards; for by the time public opinion had ripened in 1837 for a law which demanded the attestation of all wills, whether of real or personal property, Parliament concluded to abolish nuncupative wills altogether, except for the privilege already accorded to soldiers and mariners[2].

Since 1837, therefore, oral wills have had no general countenance in England, regardless of the amount to be disposed of. In many of the United States, too, Massachusetts for instance, the same policy is now pursued. Some American codes, it is true, permit estates of trivial value, in amounts commonly ranging from $30 to $100, to be thus orally bequeathed; while in California persons who are expecting immediate death from injuries received the same day are admitted to the right of nuncupation. But the prevalent rule in the United States admits no class of persons to the privilege, except soldiers and mariners[3].

How strangely does this legislation contrast with the policy to which precedents have committed our courts, where the gift *causa mortis* is in controversy. Scarcely was the nuncupative will securely locked in the iron grasp of the Statute of Frauds, before

[1] Act 29 Car. II (Statute of Frauds), §§ 19, 23.
[2] 1 Vic. c. 26, § 11.
[3] 1 Jarm. Wills, 97, Am. Ed., Bigelow's note.

this donation for posthumous effect of Roman paternity sprung up in its place. Chancery protection was invoked for these gifts, and not in vain, early in the eighteenth century; and in 1708, or about thirty years from the date of Charles II's enactment, we find the gift *causa mortis* defined in nearly the precise terms of a nuncupative will[1]. One might almost believe that the Chancery lawyers of England were trying to circumvent Parliament by finding a place for the oral will under a new and assumed name. But Lord Hardwicke showed a determination to separate the two transactions, and make delivery, as in other gifts, the striking feature of the new mode of death-bed transfers[2]. But admitting some sort of delivery to be needful, besides the suitable words of disposition, the next effort, by those who wished to re-establish oral dispositions for *post-mortem* effect in our law, lay in the direction of making as informal a delivery as possible serve the purpose. Loose methods of delivery under Chancery sanction have grown greatly into favour these last two hundred years, the theory of equity courts being that the intention to deliver ought to prevail over mere technical informalities. So long as corporeal personalty alone was given, the abuse of this donation was comparatively little; a donor might give his clothes, the furniture in the room, the money about his person, his watch and jewelry, and yet his power of manual delivery was much circumscribed while he was confined to the sick chamber. But when documents and writings, which symbolized money rights of the widest range in value, were found equally capable of transfer by a symbolized delivery, the executor and kindred might well be uneasy. If a bill or note payable to order might be delivered in gift, ought it not to be indorsed? If assignment with delivery was the legal form of transfer for a certain writing, ought there not to be at least an assignment?

In *Duffield* v. *Elwes*[3] the turning-point was reached in our law of informal delivery by way of gift. Here Lord Eldon ruled that a bond and mortgage would pass to a donee on mere delivery of the document and a verbal declaration of gift without any further assignment in writing. The Chancery Courts, English and American, have since sustained the gift *causa mortis* of an unindorsed bill of exchange or promissory note, or a cheque payable to the donor's order. One may now deliver to another a policy of life insurance, or an interest-bearing bond, saying, 'This is yours,' and make a good gift of it, according to English precedent. In some American States, the handing over a bank-book may amount to a gift of the

[1] Prec. ch. 269.

[2] *Ward* v. *Turner*, 2 Ves. Sen. 436.

[3] Bligh, N. S. 497.

deposit. As to stock, the Courts appear to hesitate; and yet the principle has in New York been extended to property of this description, so that a gift *causa mortis* may take effect by a simple delivery of the certificate. A box and key handed over with intent to donate the valuable securities it contains, has been permitted to carry these contents; and a sealed package of money, coupon-bonds, bank-books, and the like, to give *causa mortis* according to the written directions which may accompany the delivery, notwithstanding the practical effect be to constitute a testamentary disposition without the solemn formalities of a written will. And in spite of various enactments whose common policy is to require all testaments to be written out, subscribed and attested by two or even three witnesses, the validity of a gift *causa mortis* remains unimpaired at our law [1].

Let us suppose, then, an instance by no means unlikely to occur to-morrow in England or America. A man of easy fortune lies at the point of death. His will has already been deliberately and solemnly executed, his legatees carefully designated, his executors named. The bulk of his property consists of money in the funds, bank deposits, bond and mortgage securities, and promissory notes; all personal property of one description or another. The papers or securities are all contained in a box properly hidden away. Some relative or friend, having free access to the sick chamber, knows where the box and key are kept, and, seizing his opportunity, takes possession while the testator is unconscious and dying. The will is produced after the testator's death, and the executor proceeds to gather in the effects so as to settle the estate in accordance with the testator's long cherished wishes. But this relative or friend who has yielded to temptation claims the box of securities as his own. He pretends that it was given to him *causa mortis* in due form at such a date by the dying owner. Perhaps he induces some nurse or attendant, by a share in the spoils, to confirm his story, or that other circumstances may be adroitly turned to corroborate it. Unless the executor and the beneficiaries can shake this statement by cross-examination, their situation is helpless indeed; the claimant, under many codes, needs no other witnesses, and the only one who could have directly disputed his story has passed away. Or let us again suppose the dying testator to have asked the person in whom he confided to hand him this box for inspection. After looking over the contents he hands it back, asking the person in a low tone to put it safely by; here a possession being fairly acquired, the bailee, with a conscience less seared by guilt, may persuade

[1] See *Veal* v. *Veal*, 27 Beav. 303; *Clement* v. *Cheesman*, 27 Ch. D. 631; *Pierce* v *Savings Bank*, 129 Mass. 425; Schoul., Pers. Prop., §§ 166-175.

himself that the box and contents were given him for his own; he interprets the dying owner's words to please himself. And once more, we may imagine the testator, while his mind is clouded, getting his valuable papers into his hands, while two out of three of the expectant kindred or beneficiaries are at his bedside. Scarcely knowing what he does, he hands securities worth £5000 to the first, and other securities of the same value to the second, neither assigning nor indorsing, executing no writing whatever, but using words which might, were he in his right mind, import a gift. Is it in human nature to suppose that these two donees will not strenuously insist that the transfer was freely and intelligently made to them, while the absent son or brother has only negative evidence to oppose? For all this is done without the safeguard of several disinterested witnesses.

The dangers, the temptations which hover about the bedside of a dying person, whose relatives gape for the inheritance, were well understood when our legislatures pronounced that all wills should be written, signed, and duly witnessed. It is to this bedside of death that fraud casts its most alluring looks. And many judges, when compelled by precedent to sustain gifts *causa mortis*, have expressed their regret that such informal transfers, without written precautions of any kind, were ever permitted. 'In my judgment,' says one of these judges, 'this doctrine is fraught with the greatest dangers. It leads into temptation from which we all pray to be delivered, and it greatly facilitates fraud. The whole thing is wrong. But it is settled by authority, and we are not at liberty to reverse it[1].'

What, then, is the remedy to be applied? The answer is simple and natural. We should in England, and the several American States, make the local attitude a consistent one toward all oral and informal dispositions for posthumous effect. Having deliberately concluded it wise policy that estates should be settled and distributed as though one had died intestate, and by a scheme which operates with even justice among kindred, or else in accordance with the terms of a last will positively executed and never positively revoked, rather than to grope among uncertain proofs of a testator's supposed intentions,—or in other words, having concluded that wills, to operate at all, should be written out, subscribed and attested,—our law should equally discountenance whatever mode of transfer violates that policy, be it pursued under one name or another. The nuncupative will of a soldier in actual service or of a mariner at sea is still treated as valid; so with equal reason might be his gift *causa mortis*.

[1] Peckham, J. in *Walsh* v. *Sexton*, 55 Barb. 251 (1869). And see *Tillinghast* v. *Wheaton*, 8 R. I. 536.

In various jurisdictions, as under the old Statute of Frauds, chattels of petty value may be willed by word of mouth: and if so, they might be donated. But as oral bequests constitute an exception to the rule, the same ought to hold true of oral gifts *in extremis*. Where the State has not outgrown the legislation of Charles II, the language of that Act suggests the precautions suitable for death-bed gifts not of the privileged kind or value. They should only be allowed when made in presence of three or more witnesses and capable of clear proof; the language accompanying delivery should be shown to consist clearly with the intention of conferring ownership, on condition of death; the place and the surroundings should favour free choice and a deliberate purpose; the witnesses should reduce their statement to writing soon after the donor dies, and while the details of the scene are held in memory. The gift must, of course, be made in peril of death; and considering the peculiar disadvantage cast upon the executor or administrator by the donee's possession under a colour of right, it would be well to provide that any one who claims to be donee under such a gift should not only present his claim formally in the probate court soon after the donor's death, but place the property whose donation is claimed in the custody of the court, or of a special administrator appointed by the judge, pending the decision.

All this, however, suits the jurisdiction where half-measures still prevail, and a tender solicitude for dying wishes carelessly expressed. In England, and in many American States, wills unsigned and unwitnessed are now altogether discarded, from a sterner but manlier sense than formerly of the responsibility which rests upon the judge who stands between the dead and the living; and where such a system is pursued, gifts *causa mortis*, except for the privileged soldiers and mariners, should be no longer countenanced at all. Gifts, indeed, of any kind, and voluntary transfers, whether conditional or unconditional, may well be suffered to fail, when made at the last extremity and in immediate peril of death.

Lord Eldon himself, while in the very act of clearing away long ago the most formidable barrier which English conservatism had erected against these death-bed donations, showed his own plain dislike of such transfers. 'Improvements in the law,' said his lordship, 'or some things which have been considered improvements, have been lately proposed; and if, among those things called improvements, this *donatio causa mortis* were struck out of our law altogether, it would be quite as well[1].' Many thoughtful judges

[1] *Duffield* v. *Elwes*, 1 Bligh, N.S. 533.

and practitioners of our day concur in this view; as would many more, had they ever experienced the practical mischief which this doctrine has already produced, and the greater mischief which it threatens. But the Courts are powerless to throw off the foreign incubus; and the remedy, if it comes, must come through the legislature. Public opinion should be interested; and we of the legal profession ought to take the initiative in setting forth the evil and the true means of its correction.

JAMES SCHOULER.

OXFORD LAW STUDIES[1].

THAT the profession of the law is necessary in a civilized commonwealth, and competence therein by no means to be attained without study, is matter of common knowledge. In speaking here of that study we have to consider more closely how it stands with us, not only as English citizens, but as scholars in this University. To what end is our study and teaching of law? Shall we say that we aim at producing successful lawyers? That would be a facile answer, if tenable. But it will not hold on any side. The University would justly refuse approval to it, as the world would justly refuse credit. Speaking as from the world to the University, I should feel constrained to say that such is not our competence; we could not achieve this if we would. Speaking as from the University to the world, I would say that such are not our aspirations; we would not undertake this if we could. Nay more, the undertaking is not within any resources of human teaching; it is in its own nature beyond them. Success in a profession depends, at the last, on a man's self and not on what he has received from without. All that his friends can do for him, or any teaching or training institution whatever, is to furnish him forth with such equipment that he may be ready for opportunities when they come, or for the one critical opportunity. And we cannot make even this our business to the full extent or for its own sake. We are no more called upon to make our graduates accomplished advocates or draftsmen than to make them accomplished engineers or railway directors. What really does concern us is that there is a science as well as a practice of law; a science inseparable from the practical art, or separable only at the cost of ceasing to be versed in real matter, but still a science of itself. And we shall find that in this there is nothing strange to our traditional habit, or alien from our dealing with other arts and sciences which have a practical side. If we consider the most obviously academical, and certainly not the least noble or strenuous of professions, we shall find the same distinction in force. The humanities are indispensable to a good schoolmaster, but we do not therefore warrant that our prize-men and classmen shall be good schoolmasters. If any one holds our Classical Schools cheap for not being, as of course and without more, an *officina* of successful teachers of the classics, the same greatly misconceives both the function of the University and the

[1] A Public Lecture delivered in the University of Oxford, May 22, 1886.

dignity and difficulty of the teacher's office. What, again, of our relation to those other arts, eminently so called, which more visibly adorn and elevate life? Why have we saluted Mr. Herkomer as a colleague, and why do we receive Dr. Joachim and Dr. Richter not only as the welcome and familiar guests of England, but as partakers of the honourable degrees of our ancient English Universities? Surely it is not that we expect to send out into the world, from hence or from Cambridge, a certain number of painters and musicians. It is indifferent whether we send out any. The significance of our action is a different and independent one: that the humanities are not limited by any one form of expression. Because Michel Angelo and Turner not less than Homer, Bach and Beethoven not less than Plato, had the secret that bids the immeasurable heavens break open to their highest, therefore we do honour, in the name of the Muses whom we serve, to the masters and ministers of their art. The witness of our various activities here, of the new studies which some regard with suspicion from within, and some with contempt from without, is that the humanities have their part in all science whatever; that a profession, above all a learned profession, is not an affair of bargain and bread-winning, but the undertaking of a high duty to mankind. We do not say that in our schools we can make a man a skilled physician; but we can show him what is the tradition inherited by the science and art of medicine, and how intimate its connexions with the whole of man's knowledge of nature and of himself. Neither do we say, perhaps even less ought we to say, that we can make a man a skilled lawyer. But we can endeavour to impress on him those larger and more generous notions which, if not planted betimes, are apt to wither in the dust of technical detail and the heat of forensic business. We can help him to regard law not merely as a regulated strife, or a complex machine for securing and administering property, but as the greatest, the most interesting, and in one word, the most humane of the political sciences. We can show him how legal ideas, legal habits of thought, oftentimes even legal controversies of the most distinct and technical kind, have entered into the very marrow of our political history, and may do so again. We can guide him to the distinction of that which is accidental and local from that which is permanent and universal; we can map out for him the analogies and contrasts between our own system and that of the Roman law, with whose descendants and successors our Germanic law, broadly speaking, divides the civilized world. Most chiefly, we can help him to fix in his mind that there are such things as general principles of law; that the multitude of particulars in which he must inevitably be versed as a practical student and worker are

not really a chaos; and that, if he sets out with good will and good faith, he need have no fear that the search for a true art founded on science, τέχνη, will lead him into the wilderness where blind and erring tribes worship routine justified by rule of thumb, the ἄτεχνος τριβή denounced by Plato and by all sound philosophy.

So much we offer to the student, and it is not a little. If proof be needed that the offer is no vain boast, it shall presently be forthcoming. But a University has regard to the mature worker as well as to the novice. We shall send forth our students warned and strengthened, as we trust, for the toil of their strictly professional training, and prepared to fill up and enrich with active experience the general notions they have already formed. For some years, perhaps for many, the larger world will claim them; many will belong to it irrevocably. Yet some will return to us, meaning to attach themselves to the science rather than the art of their profession, but with fresh interest, wider scope of knowledge, and a firmer grasp of intellect, derived from contact with the living affairs of mankind. These will not find their pursuits uncared for. We have here, in well devised order and easily accessible, all the needful appliances of legal work and research. In one way the apparatus of our science is simple; we share with moral as distinguished from natural philosophers the convenience of working mainly with books. But the amount of books a working lawyer must have within reach, whether his work be for the sake of practice or of science, is beyond the means of most private men. Our colleague Mr. Freeman can write a history without leaving his Somersetshire country-house. To write a law-book under such conditions, a man would need an exceedingly well filled purse or a singularly capacious and accurate memory, unless in other respects he were more than man or considerably less than a sound lawyer. To say, therefore, that serious workers in the law will find here an adequate and well-ordered law library—in some respects a better one than those of the Inns of Court in London—is to say that of which every lawyer will perceive the importance. I need not add that the means to which I refer are those placed virtually at the disposal of the University by the care and liberality of All Souls College. Moreover, opportunities for oral discussion (a way of improving knowledge and clearing up doubts which is often and justly commended by our writers of authority) are in no wise wanting. In All Souls we have a centre of legal thought and work fitted to produce results that shall be academical in the best sense, and as far as possible from academical in the disparaging sense of having no relation to real facts in which the word is sometimes used. I will be so bold as

to say that we have gone far to solve, as regards our own Faculty, the problem which some years ago was current, even to weariness of ears and vexation of spirit, under the name of the Endowment of Research.

It may be said to us, and fairly: These are your assertions on behalf of your own speciality; these are your professions of what the Oxford Law School can do; such intentions may be very good, but can you produce any visible fruit whereby men may judge your work? Now, considering the moderate number of years for which our Law School has been in existence in its present form, we think we can show fairly acceptable results. Fifteen or twenty years ago there was hardly to be found in the English language a good elementary introduction to any part of jurisprudence. I speak of elementary text-books, of works fitted to the apprehension of an intelligent but as yet untrained beginner. Books were then in just repute, as they still are, which were and are invaluable repertories of learning for the trained lawyer; but such books presuppose familiarity with the very forms of speech and order of thought wherein the novice finds his difficulties. They are meat for men. And if elementary guidance was scanty even in the common lines of English law, there was almost a total lack of it in the region of public and constitutional law; and we shall scarcely find the law of nations to be an exception in this category, notwithstanding the bulk of its English and American literature. In Roman law we had simply nothing deserving of serious mention. What do we find now? I have no mind to exaggerate our merits, but neither will I use the language of false humility because I have to speak of the work of colleagues and friends. Mr. Poste, and more lately Mr. Moyle, have made accessible to English readers (for English students who can use German books without difficulty are still the minority) the results achieved in Roman law by the Continental scholarship of this century. We can now welcome the excellent contributions of Mr. Muirhead from Edinburgh or Mr. Roby from Cambridge without feeling that our own hands are empty. Last of all, our colleague Dr. Grueber has for the first time, in his exhaustive monograph on the Lex Aquilia, exhibited to us in our own language the very form and method of the leading modern school of Roman law: and this, be it remembered, with direct and definite relation to our University course. Not less are the benefactions of Prof. Holland and Dr. Markby to the beginner in search of an introduction to the general principles of law. It was Blackstone, teaching in this University, who, in the words of Bentham's frank admission, 'first of all institutional writers taught Jurisprudence to speak the language of the scholar

and the gentleman.' The crabbed involution of Bentham's own later manner, and the still more repulsive formlessness of his successor Austin, who could never forgive Blackstone for writing good English, deprived a later generation of these advantages. In following the technical divisions of the law (with partial amendments, not always felicitous) Blackstone was at any rate intelligible to lawyers. The terminology of Bentham and Austin inflicted on us a mass of new technicalities, little better in themselves, if at all, than Blackstone's, and intelligible to nobody. Dr. Markby and Mr. Holland have delivered us from this state, and furnished us with lucid and readable expositions of the elementary (though not always easy) conceptions which underlie the detail of the law. Passing from these generalities to our particular system, we find ourselves indebted to the Warden of All Souls—and I am only repeating what I said some years ago, before I had any standing here—for a model introductory text-book on a special subject of English law.

These results, I conceive, are somewhat. But there is more yet; there is that which we may claim as not only service to professional students, but direct service to the Commonwealth. It is going, perhaps, to the verge of what is permissible in this place to refer to the constitutional argument lately addressed to the House of Commons by my friend Prof. Bryce, an argument which faced the highest and most difficult questions of modern politics. I refer to it only to say that, whether or not we agree with its aim and conclusions, no competent person can fail to admire in it the combination of learning and subtilty with sincerity and high-mindedness; and that generous adversaries were to my own knowledge among the first to bear witness to its merit. The Warden of All Souls, however, and Mr. Dicey have been elucidating the principles of our public law within strictly academical bounds, and their labours belong to our Law School in the full and proper sense. Prof. Dicey's book, designed for peaceful uses, has become an armoury for political combatants; whether the untried weapons snatched out of it by untrained hands are altogether safe for those who wield them, it is for the captain and not for the armourer to consider. Sir William Anson's exposition of the law of Parliament has been only these few days in our hands. It is at least an excusable ambition to hope that work of this kind, addressing itself to all capable citizens, and executed by persons of verified competence who are removed from the stress and disturbing influences of active politics, may do something to enlarge the horizon of English political thought, and mitigate the crudeness and bitterness of English political controversy. In no generation

of English history has the solid framework of law and custom on which the English Constitution is built up stood more in need of plain, definite, impartial exhibition than it does this day. At no time has it been fitter for us to be put in mind that the effective power of law is not only the work but the test of a civilized commonwealth, and that law, as a great English writer has said, is in its nature contrary to such forces and operations as are 'violent or casual.' It may be now and again inevitable that the casual fortunes of political strife determine resort to violent experiments for whose consequences we have no warrant. There may be such junctures brought about in the fates of nations, or by the improvidence of their rulers, that good citizens must acquiesce in desperate remedies rather than expose their country to yet worse evils. We who believe that law, like all other human sciences, and politics, like all other human arts and faculties, rest at bottom on the nature of things, and that the nature of things cannot be deceived and will not forgive, may submit to such things if the need for them is proved; but we will not praise them, nor the men who have made them needful. The learning which practical men affect to despise shall help us, at least, to know whither we are going, and what we risk.

It is time to come back from justifying ourselves to the world to considering, here among ourselves, how we shall best further our work. There are some kinds of technical study (I have already hinted) which cannot well be undertaken here, or not so well here as elsewhere. In what lines, then, is it wise to guide our students, having regard both to the abundance and to the limitations of our resources? Let us consider for this end the general forms of an English lawyer's knowledge. They may be laid out in a threefold division of things necessary, things useful, and things of ornament. Some knowledge is necessary to a lawyer, in the sense that it should be always in his mind, and capable of being instantly called up into active apprehension, and that a good lawyer would be ashamed of not having it at command. Much is useful, but not in this way necessary. A good lawyer will be glad to have the full and actual command of as many departments as he can. But no man can thus occupy the whole field of such a science; and as a rule, both in practical and in speculative work, one must choose one or two departments for minute acquaintance, and in others be content with a sort of index-knowledge. Outside his own special branch, a sound lawyer will know where to look for full information, and have a fair notion of what he may expect to find. But it will be no shame to him not to be ready with an off-hand answer. Then we have the matters which are rather of delight and curiosity than

of immediate profit, and are the ornaments of professional knowledge. Familiarity with them is the mark of the lawyer who is learned in the eminent sense, as distinguished from him who is merely competent. Now and again they become of importance, even of capital importance, in practical application; witness, for example, the masterly historical investigation of the jurisdiction of Justices of Assize delivered as a judgment in Fernandez' case[1] by Willes J. But to be thus applied, they must have been acquired for their own sake: they cannot be 'got up' like the facts of a brief. Bearing these distinctions in mind, it is in our power here in every one of these kinds to start a learner on the true path. We cannot usefully attempt to give him even so much of the details of law as will ultimately be indispensable to him; but we can give him a clear vision and a firm grasp of elementary principles which, being called to mind as occasion requires, will save him from being oppressed and confused by the multitude of particulars. Much less can we teach him all that is useful for a lawyer; but we can aid him to form the scholarly habit which makes the difference in practice between sure-handed and slovenly execution. We cannot make him a profound jurist or an accomplished legal historian; but we can aid him to form tastes which, after the inevitable stress of purely technical training has been endured and has done its work, will lead him to enjoy the fruits of the higher learning, it may be to add to them.

In particular, the course of our Law School—and I refer more especially to the course prescribed for the Civil Law degree[2]—gives an opportunity, which may not recur for years after, for imbuing the mind, at the stage when it is just ripe for appreciation, with the classics of English legal and political science. A student will hardly lose sight of the larger bearings of jurisprudence who has been grounded betimes in Hobbes, in Blackstone, in Burke's great constitutional speeches and writings, in the best parts of Bentham's work, and in the lines of research opened by my predecessor in this Chair, Sir Henry Maine. Herein I assume a genuine pursuit of knowledge. There is no kind of sound doctrine which may not be —and I fear I must say, which is not—perverted by short-sighted learners and unscrupulous teachers, who substitute for the pursuit of

[1] 10 C. B., N. S. 1.

[2] It may be proper to explain, for readers not familiar with the somewhat complex arrangements of the Oxford Schools, that the Honour School of Jurisprudence is one of the several optional ways of taking a degree with honours in Arts. The degree in Civil Law is open only to candidates who have already graduated in Arts (not necessarily in any particular School), and the examination for it is of a more advanced kind. There is not any corresponding examination at Cambridge, where attempts to make some similar use of the Chancellor's Medal for Legal Studies have failed: but the Law Tripos, which confers a degree in Arts or Laws at the successful candidate's option, covers a somewhat wider ground than the Oxford School of Jurisprudence.

knowledge the pursuit of examinations. For such as these their place is prepared, according as they have desired and deserve. The Muses will deal with their blasphemies in their own good time, showing perhaps some mercy to the dupes, but none to the sinners against light.

Again a man may learn here better than elsewhere, and certainly better than by perfunctory reading snatched from the time which is none too much for his practical training, to appreciate the Roman Law as a real and living system, different from our own but of kindred spirit, and presenting the most instructive analogies even in detail. It is neither possible nor desirable for an English lawyer to know the Corpus Juris in the way that a German professor does; and a compulsory smattering of undigested Roman law rules and terminology is worse than worthless. But the original authorities of the Roman system are, compared with our own, compendious; and a moderate amount of systematic application under proper guidance will give a man a range of legal ideas more complete in itself and more conducive to orderly thinking than he is likely to get from any other form of legal study at present practicable. In the Common Law we have outgrown Blackstone's work, and we are not yet ready to replace it.

And this brings me to a not unimportant consideration: that the invaluable habit of first-hand work and constant verification can be formed and exercised in a limited field no less than in an unlimited one, and, for the beginner, even better so. We no longer make and transcribe notes and extracts, with infinite manual labour, in a huge 'commonplace book,' as former generations were compelled to do by the dearth of printed works of reference[1]. But, since the law is a living science, no facilities of publishing and printing can ever perfectly keep pace with it. A student who intends to be a lawyer cannot realize this too soon. There is no need for him to make voluminous notes (indeed there is a great deal of vain superstition about lecture notes); but those he does take and use ought to be made by him for himself, and always verified with the actual authorities at the first opportunity. Another man's notes may be better in themselves, but they will be worse for the learner. As for attempts to dispense with first-hand reading and digesting by printed summaries and other like devices, they are absolutely to be rejected. No man ever became a lawyer by putting his trust in such things; and if men can pass examinations by them, so much

[1] The old 'Abridgments' are nothing else than the commonplace books of eminent lawyers. See the preface (attributed to Hale) to Rolle's Abridgment. Hale's own unpublished commonplace book, an amazing monument of minute industry, is preserved among the MSS. of the Lincoln's Inn Library.

the worse for the examinations. It is of course needless to say this to scholars; I now speak of purely professional experience. And in order to form the habit of first-hand work it is not necessary to possess many books, or even to have constant access to libraries. There is nothing to prevent any student of average means from having in his own copies of good modern editions the whole of the authentic texts of the Roman law. If however the Corpus Juris appears too formidable, the use of select parts of the Digest has been greatly facilitated by the publications of this University. English authorities are less manageable, but the selections of leading cases which have been published on both sides of the Atlantic (I may specially mention as the latest and one of the best Mr. Finch's, on the Law of Contracts) will go some way towards enabling the student to practise real search and verification without so much as leaving his own rooms. At the same time it is good to learn, as early as may be, the use of public libraries, catalogues, and books of reference generally. Facility in such things may seem a small matter, but much toil may be wasted and much precious time lost for want of it. To the working lawyer these things are the very tools of his trade. He depends on them for that whole region of potential knowledge which, as I have said, must bear a large proportion to the actual. And where can one learn the mechanism of scholarship, general or special, better than at Oxford?

It is somewhat old-fashioned, though there is plenty of authority for it in our legal literature, to offer general good advice for the student's conduct of life. Such advice is apt to fall upon a dilemma. If you have had the experience on which it is founded, you do not need it; if not, you will not believe it. And after you have forgotten the advice and the adviser, and discovered the truth of things at your own charge, you will say to yourself quite innocently, Why did not some one tell me this before? Yet a few hints of warning and encouragement may fall on kindly soil and ripen. And therefore I would say to the student going forth into the heat of the day, Trust your own faculties and the genius of your University, and beware of the idols of the forum. You will meet those who will endeavour to persuade you that it is 'unbusinesslike' to be a complete man; that you should renounce exercises and accomplishments, abjure the liberal arts, and burn your books of poetry. Do this, and the tempters will shortly make you as one of themselves. You will steadfastly regard your profession as a trade; you will attain an intolerable mediocrity, the admiration of crass clients, and the mark of double-edged compliments from the Court; you will soberly carry out the rule laid down in bitter jest by a judge who was a true scholar, of attending to costs first, practice

next, and principle last; you will stand for Parliament, not as being minded to serve the common weal, but as thinking it good for you in your business; and if you are fortunate or importunate enough, you may ultimately become some sort of an Assistant Commissioner, or a Queen's Counsel with sufficient leisure to take an active part in the affairs of your Inn, and prevent its library from being encumbered with new-fangled rubbish of foreign scientific books. But if you be true men, you will not do this; you will refuse to fall down and worship the shoddy-robed goddess Banausia, and you will play the greater game in which there is none that loses, and the winning is noble. Let go nothing that becomes a man of bodily or of mental excellence. The day is past, I trust, when these can seem strange words from a chair of jurisprudence. Professors are sometimes men of flesh and blood, and professors of special sciences are not always estranged from the humanities. For my part, I would in no wise have the oar, or the helm, or the ice-axe, or the rifle, unfamiliar to your hands. I would have you learn to bear arms for the defence of the realm, a wholesome discipline and service of citizenship for which the Inns of Court offer every encouragement, and for learning to be a man of your hands with another weapon or two besides, if you be so minded[1]. Neither would I have you neglect the humanities. I could wish that every one of you were not only well versed in his English classics, but could enjoy in the originals Homer, and Virgil, and Dante, and Rabelais, and Goethe. He who is in these ways, all or some of them, a better man will be never the worse lawyer. Nay more, in the long run he will find that all good activities confirm one another, and that his particular vocation gathers light and strength from them all.

And what is to be the reward of your labour, when you have brought all your best faculties to bear upon your chosen study? Is it that you will have more visible success and prosperity than others who have worked with laxer attention or with lower aims? Is it that the world will speak better of you? Once more, that is not the reward which science promises to you, or to any man. These things may come to you, or they may not. If they come, it may be sooner or later; it may be through your own desert, or by the aid of quite extraneous causes. The reward which I do promise you is this, that your professional training, instead of impoverishing and narrowing your interests, will have widened and en-

[1] The Inns of Court School of Arms is well approved by the authority of our old writers on Pleas of the Crown and the office of a Justice of the Peace, who all say that cudgel-playing and such like sports, as tending to activity and courage, are lawful and even laudable. Hawkins (P. C. 1. 484) closes a whole *catena* of such authority.

riched them; that your professional ambition will be a noble and not a mean one; that you will have a vocation and not a drudgery; that your life will be not less but more human.

Instead of becoming more and more enslaved to routine, you will find in your profession an increasing and expanding circle of contact with scholarship, with history, with the natural sciences, with philosophy, and with the spirit if not with the matter even of the fine arts. Not that I wish you to foster illusions of any kind. It would be as idle to pretend that law is primarily or conspicuously a fine art as to pretend that any one of the fine arts can be mastered without an apprenticeship as long, as technical, as laborious, and at first sight as ungenial as that of the law itself. Still it is true that the highest kind of scientific excellence ever has a touch of artistic genius. At least I know not what other or better name to find for that informing light of imaginative intellect which sets a Davy or a Faraday in a different rank from many deserving and eminent physicists, or in our own science a Mansfield or a Willes from many deserving and eminent lawyers. Therefore I am bold to say that the lawyer has not reached the height of his vocation who does not find therein (as the mathematician in even less promising matter) scope for a peculiar but genuine artistic function. We are not called upon to decide whether the discovery of the Aphrodite of Melos or of the unique codex of Gaius were more precious to mankind, or to choose whether Blackstone's Commentaries would be too great a ransom for one symphony of Beethoven. These and such like toys are for debating societies. But this we claim for the true and accomplished lawyer, that is, for you if you will truly follow the quest. As a painter rests on the deep and luminous air of Turner, or the perfect detail of a drawing of Lionardo; as ears attuned to music are rapt with the full pulse and motion of the orchestra that a Richter or a Lamoureux commands, or charmed with the modulation of the solitary instrument in the hands of a Joachim; as a swordsman watches the flashing sweep of the sabre, or the nimbler and subtler play of opposing foils; such joy may you find in the lucid exposition of broad legal principles, or in the conduct of a finely reasoned argument on their application to a disputed point. And so shall you enter into the fellowship of the masters and sages of our craft, and be free of that ideal world which our greatest living painter has conceived and realized in his master-work. I speak not of things invisible or in the fashion of a dream; for Mr. Watts, in his fresco that looks down on the Hall of Lincoln's Inn, has both seen them and made them visible to others. In that world Moses and Manu sit enthroned side by side, guiding the dawning sense of judgment and

righteousness in the two master races of the earth; Solon and Scaevola and Ulpian walk as familiar friends with Blackstone and Kent, with Holt and Marshall; and the bigotry of a Justinian and the crimes of a Bonaparte are forgotten, because at their bidding the rough places of the ways of justice were made plain. There you shall see in very truth how the spark fostered in our own land by Glanvill and Bracton waxed into a clear flame under the care of Brian and Choke, Littleton and Fortescue, was tended by Coke and Hale, and was made a light to shine round the world by Holt, and Mansfield, and the Scotts, and others whom living men remember. You shall understand how great a heritage is the law of England, whereof we and our brethren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer. So venerable, so majestic, is this temple of justice not wrought with hands, this immemorial and yet freshly growing fabric of the Common Law, that the least of us is happy who hereafter may point to so much as one stone thereof and say, The work of my hands is there.

FREDERICK POLLOCK.

SPRING AND AUTUMN ASSIZES.

A GOOD deal has been said of late years as to the inconvenience caused by the Judges of the Supreme Court having to leave London so frequently to hold Assizes. Formerly Assizes were held only twice a year, in the Spring and Summer. A Winter Assize to try criminals was afterwards added occasionally, when circumstances were considered to require it. Under the present system there are four gaol deliveries for every county in each year, and it is with the Spring and Autumn Assizes which are held for this purpose that I at present propose to deal.

The object of having four gaol deliveries in a year is a laudable one. It is to ensure that accused persons should be brought to trial within three months of their final committal: and it is no part of my present purpose to curtail or diminish the right of the criminal part of the population to a quarterly trial of all indictable offences. I assume that this right has been now finally conceded to them. What I shall endeavour to show is, that the Judges of the Supreme Court might be relieved of the inconvenience of absenting themselves from London so frequently as now without any diminution of this right, or any disadvantage to the administration of criminal justice.

Before stating the proposals which I wish to make it is desirable to see what is the nature of the business which is transacted at the Spring and Autumn Assizes, to conduct which the Judges are called upon to leave their courts in London, whilst the Counties and Sheriffs are put to a very heavy expense in receiving them with the pomp and circumstance suitable to the dignity of Judges of Assize. For this purpose I give the following statement of the criminal cases which came before the Judges at the Joint Assizes held alternately at Reading and Oxford for the two counties of Berkshire and Oxfordshire in the years 1883, 1884, and 1885. At these six Assizes eighty-nine persons were charged on indictment. But of these eighty-nine indictments twenty-three were triable at Quarter Sessions, under the existing law, and therefore the total number of Assize prisoners stands at sixty-six, being an average of eleven prisoners for each Joint Assize.

The quality of the offences may be fairly tested by the sentences passed, which were as follows:—

Imprisonment not exceeding 3 months	18
Imprisonment exceeding 3 but not exceeding 12 months . . .	23
Imprisonment exceeding 12 months but not exceeding 2 years . .	3
Penal servitude not exceeding 7 years	6
Exceeding 7 years	4
Death (not followed by execution)	1
Acquittal or otherwise disposed of	34
	89

It is obvious upon an inspection of these figures that the business disposed of at these Assizes was mostly of a nature not more important than that usually disposed of by Quarter Sessions. It was certainly not of a nature to require the presence of one of Her Majesty's Judges. I propose to relieve the Judges of the duty of attending these Assizes by an enlargement of the judicial powers of Quarter Sessions, providing at the same time means for strengthening the Court of Quarter Sessions in cases of exceptional importance.

But this cannot be done without the assistance of the Legislature, and, therefore, an Act of Parliament to amend 5 and 6 Vic. c. 38 (1842), which defines the criminal jurisdiction of Quarter Sessions, must be the first step in the direction which I have indicated.

The general provisions of such an Act would be:—

1. A declaration that it shall be lawful for the Justices of the Peace for Counties at their Sessions to be holden in April and October to try any person for any indictable offence committed within the limits of their jurisdiction, or within the limits of any borough locally situate within their counties[1]; and that such power shall extend not only to such offences as the Justices were competent to try before the passing of the suggested Act, but to such offences also as they were previously prohibited from trying.

2. A restrictive provision to the effect that, in all cases in which a person shall be indicted for an offence not within the jurisdiction of Quarter Sessions before the suggested Act, *a Judge* under special circumstances, or under ordinary circumstances *a Commissioner* shall be the President of the Court, without prejudice to the rights and duties of the Chairman of Quarter Sessions in all other matters incident to the proceedings of Justices in Quarter Sessions.

[1] Certain large boroughs must be excepted and dealt with separately, and the Act of course must not affect the Central Criminal Court.

3. An authority to the Crown to appoint yearly a certain number of Barristers of specified standing to act as Commissioners for the purposes of the Act.

4. An extension of the power given to Justices in Quarter Sessions by the Act of the 4th and 5th William IV. c. 47, so that the power of acceleration or postponement given by that Act as to the Easter Session shall apply to all Sessions.

5. An authority to the Queen in Council to make regulations for assigning circuits to the Commissioners, for directing the attendance of a Judge instead of a Commissioner when necessary, for fixing the days for the trial of prisoners, and for other purposes.

6. An authority to the Court of Quarter Sessions sitting under the Presidency of a Commissioner (which authority in cases of indictment for capital offences should be an imperative duty) to remit to the next ensuing Assize the trial of any prisoner who in the opinion of the Court ought to be tried before a Judge of the Supreme Court.

Then I assume that the regulations to be made by Order in Council would be of a nature to provide for a practical application of the Act, such as I am about to illustrate.

I will take the district in which I live, and will assume that a Judge or a Commissioner may be appointed for a circuit of the following places, 1. Reading, 2. Oxford, 3. Worcester, 4. Gloucester, and that the first of April is the day on which, under existing circumstances, the Session would commence.

The County business at each place would be taken on the first of April.

The Commissioner (or Judge) would be at Reading on the second to try the Assize prisoners;

He would be at Oxford on the third or fourth, to which day the Session would be adjourned from the first under instructions from the Central Authority having in charge the arrangement of the circuit;

He would be at Worcester on the fourth or fifth;

He would be at Gloucester on the fifth or sixth.

But to enable the Central Authority to decide at what places a Judge and at what places a Commissioner should attend, and generally to arrange the circuit, it should be made incumbent on the Clerks of the Peace to report on a certain day before the commencement of the Session the number of Assize prisoners and the nature of their offences.

I think that it might be left to the Chairman of Quarter Sessions to charge the Grand Jury on all the bills of indictment.

The circuits might well be larger than that which I have sug-

gested by way of illustration; and it would be desirable and not difficult to strengthen the panel of the Grand Jury for those particular Sessions.

I have spoken only of the Easter and Autumn Assizes, and it might be desirable, at present, to deal with these only. But, of course, the system I propose might be extended generally to the trial of all criminals, and thus the Judges of the Supreme Court might be still further relieved. It would also be perfectly possible to utilize the County Court Judges as Commissioners under the proposed scheme, if it were thought desirable to do so. Indeed an Act has already been passed (47 & 48 Vict. c. 61. s. 7) which enables the Crown to include County Court Judges in the Commissions issued for holding Assizes, which seems to indicate that the employment of County Court Judges to assist in the despatch of criminal business has been under consideration.

The foregoing suggestions have no pretension to do more than to indicate a bare outline of a scheme, which, if it could be carried into effect, would practically relieve the Judges of the Supreme Court from the duties of the Spring and Autumn circuits, and thus would reduce to the smallest possible dimension the waste of time and power involved in the existing arrangement.

C. E. Thornhill,
Chairman of Quarter Sessions
Oxfordshire.

BUNCH VERSUS *GREAT WESTERN RAILWAY COMPANY.*

THE decision in *Bunch* v. *Great Western Railway Co.*, though appearing to turn upon a rather fine point of law, is in reality of considerable practical importance to the railway-travelling public. The plaintiff in this case, arriving at Paddington Station more than half an hour before her train was timed to start, entrusted to one of the Great Western Railway porters, on his assurance that it would be quite safe in his custody, a Gladstone bag, which she expressed a wish to have in the train with her. She then 'went away' for ten minutes to meet her husband (on the premises of the Company) and to get a ticket. When she returned, the bag, which, it seems, had not been put in the railway carriage at all, was missing. For this loss the Great Western Railway Company were held liable. The County Court Judge, before whom the action was heard in the first instance, found that 'the porter was guilty of negligence in not being in readiness to put the bag into the carriage with the plaintiff on her return as promised,' and held the defendants liable. This decision has now been affirmed by the Court of Appeal (one of the three Lords Justices dissenting), but how far upon the same grounds is not, at first sight, perfectly clear.

As to the general principles governing the liability of the Railway Company in relation to passengers' luggage, it would appear to be settled law that such liability is of two kinds: (1) that of the ordinary bailee for value, who being bound by the common law to exercise the diligence of an ordinary prudent man, in relation to the subject of the bailment and under the particular circumstances, is consequently guilty of 'negligence' and liable in damages when, and only when, he fails to do so; (2) that of the 'common carrier,' a special kind of 'bailee for value,' in whose case the degree of 'diligence' required has (for various reasons chiefly connected with public policy) been fixed so high[1], that he is regarded by the law as the absolute insurer (subject to a few necessary limitations) of the goods which he contracts to carry.

Now the foundation of the special liability of the 'common carrier' being the *exclusive control*[2], which convenience requires

[1] *Coggs* v. *Bernard*, 2 Ld. Raym. 909 (1704). It was not always so. In the time of Henry VIII, according to Sir William Jones on Bailments, the carrier was generally held chargeable only when he had travelled 'by ways dangerous for robbing,' or at an 'inconvenient hour.'

[2] See *Robinson* v. *Dunmore*, 2 B. & P. 416, as to baggage on a coach: also Comyns' Digest, action on the case for negligence; Redfield on Carriers, § 101.

that he should have, of the goods entrusted to him, it might naturally be supposed that the application of this branch of the Common Law to the case of Railway Companies would render them similarly liable for *baggage* (and we are not here speaking of 'goods') in so far as they have an exclusive control of it for the purposes of the journey; and that in all other cases their liability would be that of the ordinary 'bailee for value.' Accordingly we find it established, by a course of decisions during the last forty years, that the Railway Company are 'common carriers' from one terminus of the 'journey' or transit to the other, of so much of his baggage as the passenger chooses to entrust to them for the purpose of such carriage[1]. And the fact that the Railway Company are also upon other grounds (including those mentioned above) bound to perform certain other duties, as e. g. to carry the passenger himself safely and securely[2], or with due diligence; and that they are liable as bailees for value[3] (or even, independently of contract, in tort) for any damage caused, by their negligence, to the passenger or to the property in or about his person (a fact which has never been doubted) does not in the least affect the particular duty and responsibility which we are here discussing. The real difficulties which arise in determining how far the special liability of the common carrier does or does not attach to the Railway Company are generally connected, either with an alleged suspension of the 'journey' or 'transit' (using the

[1] Since it seems the Company cannot insist on anything coming within the definition of 'personal luggage' (as to which see Shirley's Leading Cases in Common Law, p. 68) being carried at passenger's own risk. *Munster* v. *S. E. Ry.*, 4 C. B., N. S. 676.

[2] See *Ross* v. *Hill*, 2 C. B. 877.

[3] See judgment of Court of Appeal in *Bergheim* v. *G. E. Ry.*, 3 C. P. D. at p. 325. Although the principles on which the Company are there held not liable were clearly recognized so far back as 1858 in *Munster* v. *S. E. Ry.*, 4 C. B., N. S. 676, yet until the decision of the former case, the leading authority on the subject, the Railway Company's liability was not very clearly defined and was sometimes undoubtedly put too high. Three or four decisions of the latter class seem to be the only authority for the imposition of a 'common carrier' liability on the Railway Company in the present case. But in *Talley* v. *G. W. Ry. Co.*, L. R., 6 C. P. 44 (1870), though arrived at on a different principle (the implied contract of insurance being almost counterbalanced by a contract implied, as the Court held, on the passenger's part to take reasonable care, &c.) the result is practically the same as in *Bergheim's* case. *Butcher* v. *L. S. W. Ry.*, 16 C. B. 13 (1855), turns upon 'negligence of the Company' and can be explained quite apart from the 'common carrier' theory, though the Master of the Rolls holds (for perhaps obvious reasons) that that was the theory of the decision, and that the railway porter's conduct was not 'negligent.' But 'negligence' is the word used, and the decision is quite intelligible on that ground, though perhaps not very satisfactory one way or the other: see remarks of Williams J., ibid. *Richards* v. *L. B. S. C. Ry.*, 7 C. B. 839 (1849), is described in *Stewart* v. *L. S. W. Ry.*, 3 H. & C. 135, as 'a hard case.' *Leconteur* v. *L. S. W. Ry.*, L. R., 1 Q. B. 54 (1865), in so far as it was a decision under the Carriers' Act, is excepted from the class of cases at Common Law which we are here considering. The dicta in it, which appear to indicate that the Company are *primâ facie* common carriers of everything in the train, must be considered as overruled by *Bergheim's* case. But the circumstances were peculiar, and the Company appear not to have exercised the discretion which they had as to the carriage of the chattel. Query if the passenger was not allowed to act as their agent?

words always in the technical sense), or with an obscurity as to the points of delivery by the passenger to the Company, and *re-delivery* by the Company to the passenger respectively, which constitute the legal 'termini' of the journey. For instance, in the last reported case on the subject[1], the question (decided in favour of the Company) was whether the 'transit' (in relation to the particular chattel, the subject-matter of the action) had or had not terminated. And in the case we are considering the question arose whether such 'transit' had or had not ever begun, and if so whether it had or had not been subsequently suspended.

Now the 'delivery' constituting the Railway Company common carriers of the baggage of a passenger takes place *primâ facie* when such baggage is handed to the Company's servants to be 'labelled;' the 'label[2]' officially affixed being a material element in or evidence of such delivery; and the *re-delivery* to the passenger, relieving the Company of their 'common carrier' liability, takes place when the said baggage is again handed back (actually or constructively) to the passenger, on the conclusion or 'suspension' of the transit. Whether the Company are bound to do more than deliver the baggage upon the arrival platform is open to doubt[3], but there must in any case be a *real delivery*[4] to the passenger in some part of the station. At any rate the Company must be prepared during a reasonable time to *offer* delivery to the passenger; and, if he does not appear within such reasonable time and accept delivery, then, although the 'journey' and the Company's liability as 'common

[1] *Hodkinson* v. *L. N. W. Ry.*, 14 Q. B. D. 228; but there, though the expression 'transit' is used, it is not explicitly stated that if the Company had been liable their *liability would have been that of common carriers.* Under the circumstances it being held that the porter acted as the plaintiff's and not as the Company's agent, it became unnecessary to decide that question.

[2] In theory the passenger is required to *see his luggage* labelled; but proof of this is not necessary in order to establish the fact of delivery, as is clear from *Lovell* v. *L. C. D. R.*, 45 L. J., Q. B. 476 and Redfield on Carriers, §§ 71, 76, as to 'checks.' But the label would no doubt be always *primâ facie* evidence (e.g. in the case of luggage never put in the train) of a delivery to the Company; though not conclusive, as it might have been unofficially affixed, as in *Agrell* v. *L. N. W. Ry.*, 34 L. J., N. S. 134 note, where see Baron Pollock's lucid observations on the nature of the bailment to the railway porter. The facts in that case seem more than distinguishable from those of *Leach* v. *S. E. Ry.* (in the note to which Agrell's case is cited). In *Leach* v. *S. E. Ry.* there was a distinct bailment for purposes of carriage followed by what looks like a distinct resumption of control by the passenger. The Court seem to have thought that the plaintiff's words 'I don't want it labelled; I want it in the carriage' meant 'I wish the Company to be common carriers of the baggage, but *to leave it under my control.*' If so, query if the Company were under any obligation to carry on those terms: see *post.* But the two cases show clearly that there must be a real delivery to the Company, not a mere abandonment of the baggage on their premises.

[3] See *Richards* v. *L. B. S. C. Ry.*, 7 C. B. 839; Redfield on Carriers, § 73, &c.

[4] *Patscheider* v. *G. W. Ry.*, 5 Q. B. D. 278. This and the cases cited above define sufficiently clearly the essentials of the delivery and re-delivery which constitute the 'termini' of the 'transit' or journey. Also see Story on Bailments (8th edition), p. 500, notes: the delivery need not be *personal.*

carriers' may be safely considered to have come to an end [1], there is imposed upon them the further duty (which it is unnecessary here to consider) of warehousing [2] the late passenger's property. But the question in the present case arises at the commencement of the journey. Here, as is well known, two courses are open to a passenger in the plaintiff's circumstances, and his baggage naturally falls into two classes. Part is delivered to the Company in the manner above specified to be carried by them as common carriers, and of this the Company are necessarily given the physical and legal control; the passenger, in fact, surrendering his rights [3] for the time of the transit and in respect of the carriage, while as to the other part the passenger retains the control and therefore the responsibility (so to speak) himself. There may be, and undoubtedly is, in many cases, a temporary identification of the two classes of baggage. There is often a complete bailment of *both* classes, followed by a resumption of control over one; the distinction between the two arising *at latest* at the point of 'labelling.' It is important to have this point clear. The Railway Company, as contractors to carry, are *primâ facie*, as has been said, 'bailees for value' of the baggage which they carry; but in certain cases, and with regard to certain baggage, they are something more, they are 'common carriers.' Railway porters are employed to represent the Company and to perform its duties in each of these capacities. Now baggage may be delivered to a porter in various ways. A passer-by may step into the station and request a porter to 'look after' his bag while he (as is suggested in one case) 'goes round to call on his customers.' Here there is a 'delivery,' no doubt; but *it never reaches the Railway Company*, for the porter, as the Company's servant, has no power to accept it; the delivery therefore is to the porter in his individual capacity. Again there may be delivery by an intending passenger *for purposes of carriage for the journey*. Then it is, at any rate, within the 'scope of employment' of the porter to accept the baggage, in the name of the Company, as bailees for value. They accept it as they accept the passenger himself; they are bound to carry both, and subject to a definite liability in case of 'negligence' in fulfilling their duty. But, further, the Company may be required to 'insure' the baggage as well as to carry it. This is a more serious obligation. The baggage must be put under their exclusive control. But, granted that, they are prepared to act as 'common carriers' of *certain* articles, and under certain conditions.

Now for so much of the 'journey' as takes place *in the train*, the

[1] Story on Bailments, p. 500, n. 3. [2] *Chapman* v. *G. W. Ry.*, 5 Q. B. D. 278.

[3] He can exercise no such discretion as to *where* e.g. the baggage should be placed, as the Company, it was suggested, might have exercised in *Leconteur* v. *L. S. W. Ry.*: and he would, as a rule, be refused access to it during the 'journey.'

carrying machinery provided by the Railway Company consists in their luggage van or vans, or that portion of their train which they choose to appropriate for the time to the carrying of baggage. For so much of the journey as takes place *outside the train*, other carrying machinery is provided in the form of porters and 'trollies,' &c. But it is only *in so far as the use of this latter machinery forms part of the 'journey'* (as limited and defined by the Common Law and by the regulations and declarations of the Railway Company) that the employment of it by the railway passenger will involve the Company in the liability of the common carrier. The porter may use one of the Company's trollies or hand trucks, as he occasionally uses the 'waiting-room' or one of the Company's carriages for the purpose (strictly speaking) of warehousing (for his own and the passenger's convenience) baggage which has not been delivered and is not intended to be delivered to the Company for the purpose of carriage. If such an act be in any sense 'within the scope of his employment,' it is not 'as a common carrier;' while to *assume* that everything which the railway porter does with the passenger's luggage is done by him as the Company's servant—much more to assume that it is done in the capacity of common carrier, is to ignore the principles on which the Company are liable at all. If the particular act be within the scope of employment of a servant of the Company, negligence in the performance of it will of course render the Company liable in tort. So that it is not as if this were a case unprovided for by the Common Law. Now the liability of the Company as 'common carriers' is, as we submit, sufficiently clearly mapped out. It is unquestionably their business to carry the passenger's luggage on 'trollies,' or otherwise from the point of delivery to that part of their train in which its carriage is to be continued, and again from the train to the point of re-delivery to the passenger. What is meant by 'delivery' to the Company and delivery to the passenger respectively is also clearly defined (1) by the declarations of the Company as to what they will receive for carriage and *how* they will receive it[1], (2) by legal decisions[2]. And any and all of these things it is unquestionably the business and duty of the railway porter, as the Company's servant, to do. This being so, the question arises whether anything more than this is involved in the services rendered or intended to be rendered to the plaintiff in the present case. The decision of the County Court Judge, according to the Report, went

[1] See Shirley's Leading Cases in Common Law, p. 51: 'To ascertain the nature and extent of a carrier's business, reference must be made to his public professions and representations; *Johnson* v. *Midland Ry. Co.*, 4 Exch. 367.'

[2] *Patscheider* v. *G. W. Ry.*; *Hodkinson* v. *L. N. W. Ry.*, ante.

merely to the extent that the Railway Company, through their servant acting within the 'scope of his employment,' were guilty of 'negligence.' But 'negligence' as a legal term has no particular meaning *as applied to a 'common carrier,'* and there seems no reason to suppose that the learned Judge decided against the Company on the latter ground at all. All that he did decide seems to have been that there was a negligent dealing with the plaintiff's baggage by an authorised agent of the Company. The porter's conduct would certainly appear to have been negligent: whether he was authorised to do what he undertook to do is the further point we have to consider. But once assuming that he was, the liability of the Company would follow at once according to all authority. It is necessary to mention this in order to show that for the purpose of making the Company liable it is quite unnecessary to lay down, as the Master of the Rolls lays down (Lindley L. J. doubting and considering the point a 'difficult' one), that the Company were *insurers* of the hand-baggage left in charge of their servant. Now the decision of the majority of the Court of Appeal (as may be clearly seen from the judgments) rests not so much upon express authority (to some of which it appears rather to run counter) as on the argument of general reasonableness and convenience drawn from the known usage and practice of railway porters and passengers respectively. And since the services rendered to the plaintiff must be within the 'scope of employment' of the porter as a common carrier in order to make his principals liable to that extent, it is accordingly laid down[1] that any act on the part of the passenger requiring such services, such as the absenting himself for five, ten, or twenty minutes from the baggage of which he has *primâ facie* elected to retain the control himself, for the purpose e. g. of purchasing newspapers, &c., purchasing and eating refreshments in the refreshment-room, or 'looking for a friend' on the Company's premises, is in the technical sense an 'incident of the journey.' Upon this assumption it is then argued that there is here, so to speak, a 'lacuna,' an interval during which the safety of the passenger's 'hand-baggage' could not, with reasonable convenience to him, be sufficiently provided for unless the Railway Company were saddled with the 'common carrier' liability in respect of it from which, *ex hypothesi*, they have just been explicitly relieved, or which, if a formal delivery be necessary to constitute it, they have never incurred[2] or undertaken. Now to consider this argu-

[1] 17 Q. B. D. 222.

[2] The theory of a 'common control,' ceasing and recurring at intervals, put forward by the Master of the Rolls, is rather puzzling. This would make the Company's liability vary directly as the distance between the porter and the railway passenger. But is there any serious difficulty in answering the question under whose control the

ment from the beginning. Firstly, if we ask what are 'incidents of the journey,' examples will at once occur to us. The delays at stations, the crossing of the Company's lines by bridges or otherwise, the transit from one train and from one platform to another. These are undoubtedly 'incidents' which the Railway Company must be presumed to anticipate and provide for. And it is submitted that they do so, transporting and taking charge of the labelled baggage themselves during the 'incident,' as being still 'insurers' of it, and on the other hand affording the *passenger* all reasonable facilities for the steps necessary to the continuance of his journey.

It is important to observe that the 'journey' from the point of view of the passenger, as representing the whole course of the transaction during which the Company are bailees for value of himself or of any part of his baggage, is by no means synonymous with the 'journey' or 'transit' with which the Company are concerned as common carriers. The acts last mentioned are unquestionably incidents of the transit during which the safety of the labelled baggage is insured; while those suggested by the Master of the Rolls—the purchase of refreshments and newspapers (which a large proportion of passengers obtain elsewhere or dispense with altogether), the walking about the Company's platform in search of a friend, and a dozen other acts of the kind which will readily occur to the reader, though natural enough acts for the passenger under the circumstances to perform, are so far from being 'incidents' of the journey in the latter sense that they would appear *primâ facie* not even to be 'necessary acts' from the passenger's own point of view. But assuming it to be decided that these so-called 'incidents' do form an essential part of the journey or 'transit' *in any sense* (and for this the case before us seems to be the first and the only direct authority), the result follows clearly enough that the Company are *bound* to provide porters to attend upon passengers, and take charge, if required, of their 'hand-baggage' during these 'incidents.' Now the first thing that will strike us is that the Railway Company do not as a matter of fact make such provision as, according to this decision, they are legally bound to make.

baggage is at any given moment? I direct the porter to label packages *A* and *B*, and express a wish to have package *C* with me in the carriage. I cannot take back *A* and *B* and put them where I please without altering my whole relation to the Company in respect of them: argal they are at the present moment under the Company's control. The porter, similarly, as the Company's agent, cannot remove package *C* and put it in the van or elsewhere without my leave; in fact he depends on my instructions. Therefore *C* is still under my control. 'But *A*, *B* and *C* are all on the same trolly.' That is a mere accident. So might all three be on the roof of a coach together. There is no magic in the place of carriage. See *Robinson* v. *Dunmore*, ante, and remarks of Cockburn C. J., *Munster* v. *S. E. Ry.*, 4 C. B., N. S. at p. 696.

As a Company they do not contemplate the rendering of such services to the passenger as were required by the plaintiff in the present case. Their bye-laws expressly exclude it, and their regulations forbid it. Again, could they be expected to make such provision? Lord Justice Lopes thinks not: his lordship, in his judgment, suggests that if the Railway Company did do so,—that if, for instance, they were to provide porters to take charge for the period of ten minutes of the hand-baggage of passengers,—'it is difficult to see how the *business of a Railway Company* (which words are worthy of note) *could be carried on*.' Surely it is clear that if the services which the plaintiff required could in all cases be demanded as of right, the staff of most Railway Companies would require to be at least trebled or quadrupled in order to meet the possible calls upon it. And the natural deduction from the existing state of things is that no such call is in fact made upon them. This is a question of usage. And probably no usage is more stereotyped or more notorious than that of the railway traveller in the year 1886. To begin with—the large majority of such travellers, it is submitted, retain as 'hand-baggage' only such small and light articles as they can conveniently carry and 'look after' themselves during the five or ten minutes which they would ordinarily employ in the process of taking a ticket, or doing any other necessary act incidental to the journey. The Railway Company signify to their customer in the clearest manner possible, 'If you wish your luggage warehoused, we will warehouse it on certain terms; if you wish it carried and insured, we will so carry and insure it, if it is delivered to us for that purpose; or you can, subject to certain restrictions[1], take it with you in the carriage: but one of these courses you must adopt, and having once elected to retain control of part of your baggage, you cannot, merely because one of our servants employs his spare time in attending upon you, impose upon us, whenever it suits your convenience, a twofold liability which we never intended to undertake.' We venture to submit that the ordinary railway passenger fully understands this to be the only natural construction to be put upon the Company's notices and declarations, that he does deliberately adopt one of the

[1] The jury in *Bergheim's* case found that the 'proper place' for the plaintiff's bag was the 'compartment' and not the 'van.' The Company—as has been said, *Munster* v. *S. E. Ry.*, ante—cannot compel the passenger to carry any of his 'personal luggage' *at his own risk* (i. e. in the carriage with him). Presumably they can compel him to carry it in the van when the carriage of it elsewhere would interfere with the comfort of other passengers. 'Proper' in the finding quoted above appears from the context to mean 'ordinary.' *Hard* (not fragile) and heavy baggage even, which perhaps on principle ought to be carried in the van, is now constantly taken with the passenger in the carriage in order to save the time and trouble otherwise occupied in obtaining delivery from the Company at the terminus of the journey. Perhaps a question may some day arise as to the reasonableness of this usage. See note 2 on p. 479.

three courses proposed to him, in relation to each several part of his baggage, and that where after such election he entrusts hand-baggage to a porter, as the plaintiff did in the present case, he does so fully realising that inasmuch as the Company and their servants have no right to do anything with the baggage without his (the passenger's) further instructions, therefore it is he himself and not the Company who are to be considered as having the control of it.

But, theorizing apart, we have the conduct of the parties in the present case to consider. The plaintiff (and she did only what any other passenger in the same circumstances would probably have done) not only delivered her hand-baggage to the porter—she first distinguished it from the labelled luggage. Had she merely said, 'This is my luggage: I am going to Bristol,' all her three packages would no doubt have been labelled, and put in the van. But she adds explicitly, 'These two *only* are to go (in the Company's custody) in the van; the third—the bag—is to go (in my custody) in the carriage.' Now, according to the Master of the Rolls, the hand-baggage, under the above circumstances, was in the same position as the labelled baggage, 'in the possession of the Company for the purposes of the transit,' which 'was all this time proceeding subject to the ordinary delays.' If the plaintiff or the railway porter were under that impression, they must have thought that the official labelling *meant nothing*. But is it not far more probable, *primâ facie*, that the idea in the plaintiff's mind was (what we submit to be the correct view of the case) that just as baggage on its way to the van is in the same position legally as if it were already *in* the van, so baggage on its way to the carriage is in the same position as if it were already in the carriage, and that therefore, from the point when she gave the above directions, she would have to look after the 'hand-baggage' herself? At any rate, her further conduct is not inconsistent with such a view. She tells the porter *why* the bag is to be left with him, what she is going to do, and when and where she will expect to meet him and the bag again. All this is natural enough. It shows, however, that the plaintiff's conduct (to her own knowledge) required some explanation, i.e. that it had reference to something *outside* the ordinary and necessary routine of the railway porter's duty, just in the same way as the *cause* of that conduct, the plaintiff's search for her husband, was not (as we submitted above) an 'incident of the journey.' But this is not all. The plaintiff asked the Company's servant explicitly, 'if it would be safe to leave the Gladstone bag with him;' and the answer was that 'it would be quite safe.' The plaintiff clearly did not rest satisfied with the fact that the bag was in the hands of an individual who was also one of the Company's servants and in or upon one of the Company's

own 'trollies,' but required some further assurance, some further undertaking. Whatever may have been her knowledge or ignorance of the notices and regulations and general course of business of the Company she clearly did not rely on any supposed duty of the Company to insure the safety of her hand-baggage, if even to take charge of it at all, under the existing circumstances. She made no such inquiry with regard to her *labelled* baggage. But why not, if both were legally in the same position?

Again, another reasonable deduction from the fact that the plaintiff did ask the question is this: viz. that she did not feel perfectly certain that she would be allowed to leave the bag there, that she would not have been very much surprised if the porter had replied that the bag would be safer in the cloak-room, and that she ought to deposit it there. The plaintiff must have known that he would probably have declined to take charge of it for an *hour*. And on what ground? On the ground that he had no *business*, as a railway porter, to 'take charge' of it *at all*. Did the plaintiff then really suppose that because under somewhat peculiar circumstances (for which the Company were in no way responsible) it was not 'worth her while' to deposit the bag in the cloak-room, and because *there was nothing to prevent* her depositing it with the porter, that therefore the Company's notice that they would not be responsible for baggage so deposited became null and void, and that their course of business [1], instead of being fixed and uniform, was variable at the passenger's convenience? It is very difficult to believe that she did; but, if not, does it not follow from every item of the transaction that the plaintiff and the Company's servant distinctly understood that the services rendered by the latter were services of a personal and exceptional kind, to which, *quâ* passenger, she had no legal right? These points are more particularly worthy of attention because of the suggestion in the judgment of the Court of Appeal that the Railway Company 'hold out' their porters as 'having authority' to take baggage in this way; and that, that being so, no 'secret instructions' given to the porters by the Company can make any difference. This argument puts the case rather on the ground of *representation* and consequent estoppel. But a representation is of no importance unless it produces some effect on the person to whom it is made: and the passenger's probable view of the matter we have considered above. Can it seriously be argued that there is here such a 'holding out' as to override, in

[1] Which their servants (at any rate their porters and inferior officials) have no power to vary or contravene, being bound to follow the regulations (see *Slim* v. *G. N. Ry.*, 14 C. B. 647). A superintendent or general manager (whose scope of employment is larger, *Walker* v. *G. W. Ry.*, L. R., 2 Ex. 228) alone has power to extend in exceptional cases the liability of the Company.

any passenger's estimation, the Company's official notices and declarations to the contrary, which surely are public enough, and which certainly no railway porter would take upon himself to controvert? So much for the theory of the law [1] on the subject.

There seems to us an irresistible *primâ facie* case against the imposition (in the first place) of the 'common carrier' liability, under the given circumstances; against the *assumption*, in the teeth of the Company's declarations to the contrary, in the teeth of all the evidence of the conduct of the parties, of the existence of what is described in *Bergheim* v. *G. W. Railway*, as an 'entirely new contract of insurance' which the one party as the Company's agent had (both to his own and the passenger's knowledge) no power or authority to make, and which the other was *at the time of the transaction* perfectly ready to dispense with. If the balance of convenience were entirely in favour of the assumption, no doubt that would be a strong argument; but the evidence of usage and fact seems (as has been said) to point rather the other way. And if further giving the Railway Company the full benefit of their notices, we exonerate them from *all* liability for the custody, as distinguished from the *transport* of hand-baggage, does this involve any hardship to the passenger? We think not. There seems, without over-refinement, to be a real distinction (as pointed out above) between 'taking charge' of a chattel during any time, and carrying it: and if the inconvenience of which an extension of the Company's warehousing machinery would relieve the passenger is a merely *optional* inconvenience, what particular reason is there for increasing in this direction their duties and liabilities [2]?

GEORGE H. POWELL.

[1] As has been said, there appears to be no express authority on the point. An American decision, *Minor* v. *Chicago and N. W. Ry. Co.*, 19 Wisc. 40, would appear from Redfield on Carriers, p. 60, § 73, to be opposed to that of the Court of Appeal.

[2] A note of the Foreign Law on the subject may interest some readers. The precise point does not appear to have arisen before a French court. Probably the strictness of the regulations and want of elasticity in the arrangements for the convenience of travellers on the Continent would prevent its ever arising. In France, as the passenger *cannot* have his baggage registered without at the same time presenting his ticket (a formality which is apparently waived by English Railway Companies; see *Goodman* v. *G. W. Ry.*, 13 C. B. at p. 371), the circumstances are slightly different. 'Les Compagnies . . . sont tenues de faire surveiller par leurs employés les effets déposés par les voyageurs au bureau des bagages pendant le temps où ceux-ci vont au guichet où se délivrent les billets, sans la *représentation desquels ils ne peuvent obtenir l'enregistrement des dits effets*: c'est là un cas de dépôt nécessaire.' Dalloz, Rec. P. 69. 3. 69; see Dalloz, Table, s. Commissionaire. But this practically (except that an additional form has to be observed) leaves the law of delivery much the same as our own. The absence of 'enregistrement' does not *per se* discharge the Company, but puts on the passenger the onus of proving the 'fait de dépôt.' 'La prise en charge par la Compagnie . . . commence aussitôt qu'elle en reçoit le dépôt.' Chem. de F. P. L. M. c. Pernessin Garette et Gilbert, 1870, 2. 24; 1871, 2. 98. But there must be a proper delivery; Dalloz, 1870, 2. 119. As to 'hand-baggage,' by Arrêt Min., 20 Août, 1857, Art. 1, the Company are to allow free transport to 'les sacs d'espèces que les voyageurs peuvent garder avec eux

dans les voitures *sans gêner leurs voisins*. Ils ne doivent pas être incombrants ni excéder le poids voulu par les règlements.' For these and all objects 'dont les voyageurs ne se dessaisissent pas,' the Company incur no liability. Jurisprudence Générale, Tom. 44 (63), voirie par Chem. de F., 450, etc. On whole subject, cf. Cod. Civ. Art. 1782; Cod. Comm. 91, and notes of Dalloz and Vergé. In Allgemein Deutsch. Handelsgesetzbuch Kommentar von Makowar, Art. 425 (p. 317) we find 'Für Verlust, etc. von Reisgepäck welche n. zum Transport aufgegeben ist, nur gehaftet werde wenn ein Verschulden der Bahnverwaltung . . . nachgewiesen wird.' And so with articles 'welche sich in Reisequipagen tragen; weil bei dem nicht übergegebenen Gepäcke, von einer Haftung *ex recepto* könne nicht die Rede sein.'

THE MYSTERY OF SEISIN.

ANY one who came to the study of Coke upon Littleton with some store of modern legal ideas but no knowledge of English Real Property Law would, it may be guessed, at some stage or another in his course find himself saying words such as these:—'Evidently the main clue to this elaborate labyrinth is the notion of seisin. But what precisely this seisin is I cannot tell. Ownership I know and possession I know, but this *tertium quid*, this seisin, eludes me. On the one hand when Coke has to explain what is meant by the word he can only say[1] that it signifies possession, with this qualification however that it is not to be used of movables and that one who claims no more than a chattel interest in land can not be seised though he may be possessed. But on the other hand if I turn from definitions to rules then certainly seisin does look very like ownership, insomuch that the ownership of land when not united with the seisin seems no true ownership.'

The perplexities of this imaginary student would at first be rather increased than diminished if he convinced himself, as I have convinced myself and tried to convince others, that the further back we trace our legal history the more perfectly equivalent do the two words *seisin* and *possession* become, that it is the fifteenth century before English lawyers have ceased to speak and to plead about the seisin (thereby being meant the possession) of chattels[2]. Certainly as we make our way from the later to the older books we do not seem to be moving towards an age when there was some primeval confusion between possession and ownership. We find ourselves debarred from the hypothesis that within time of memory these two modern notions have been gradually extricated from a vague ambiguous *seisin* in which once they were blent. In Bracton's book the two ideas are as distinct from each other as they can possibly be. He is never tired of contrasting them. In season, and (as the printed book stands) out of season also, he insists that *seisina* or *possessio* is quite one thing, *dominium* or *proprietas* quite

[1] Co. Lit. 17 a, 153 a, 200 b.

[2] Law Quarterly Review, July, 1885. *The Seisin of Chattels.* I am indebted to Mr. M. M. Bigelow, Mr. H. W. Elphinstone, and a learned critic in the Solicitors' Journal for several new examples, both very early and very late, of the use of the word *seisin* in connection with chattels. (See Litt. sec. 177, also *Paule* v. *Moodie*, 2 Roll. Rep. 131.) But as to the usage of the thirteenth century, I have now, after having copied more than a thousand cases, no doubt whatever: the words *possideo*, *possessio* are extremely rare, but one can be seised of anything, even of a wife or of a husband. I have known a woman assert, in proof of her marriage, that she remained seised of her husband's body after his death.

another. He can say with Ulpian, *Nihil commune habet possessio cum proprietate*[1].

There are some perhaps who would have for the student's questionings a ready and brief answer, satisfactory to themselves if not to him. If, they would say, you are thinking of ownership and applying that notion to English land, you indeed disquiet yourself in vain; dismiss the idea; it is not known, never has been known, to our law; land in this country is not owned, it is holden, holden immediately or mediately of the king. The questioner might be silenced; I doubt he would be convinced. In the first place he might urge, and it seems to me with truth, that the theory of tenure, luminous as it may be in other directions, sheds no one ray of light on the strangest of the strange effects which seisin and want of seisin had in our old law. In the second place he might appeal to authority and remark that Coke, who presumably knew some little of tenures, speaks freely and without apology of the ownership and even the 'absolute ownership'[2] of land, while as to Bracton, who lived while feudalism was yet a great reality, for lands and for chattels he has the same words, to wit, *dominium* and *proprietas*.

But it may well be said, and this brings us to more profitable doctrine, that English law knew no true ownership of land because the rights of a landowner who was not seised fell far short of our modern conception of ownership. Deprive the tenant in fee simple of seisin, and he is left with a right of entry. Even now this would be the most technically correct description of his right. Until lately his right might undergo a still further degradation; from having been a right of entry it might be debased into a mere right of action.

Now it is to the nature of these rights, whether we call them ownership or no, or rather to one side of their nature, that I would here draw attention. To simplify matters as much as possible we may for the moment leave out of account all estates and interests less than fee simple. The question then becomes this, what is the nature of the rights given by our old law to a person who is lawfully entitled to be seised of land in fee simple when as a matter of fact some other person is seised? or (to use words which will not be misunderstood though they are not the proper words of art) what is the nature of the rights of an absolute owner when some stranger is in possession?

Such a student as I have imagined might well be prepared to find that possession by itself, or possession coupled with certain

[1] Bracton, f. 113, from Dig. 41. 2 (de acquir. vel amit. poss.) 12. § 1.
[2] Co. Lit. 369 a, 17 a, b.

other elements such as good faith and colour of title, or possession continued for a certain period, would have certain legal effects, effects which would consist in protecting the possessor against mere trespassers, in entitling him to recover possession if ejected by a stranger, in depriving the true owner of any right to obtain possession save by recourse to the courts, in at last depriving that owner of all right whatever and conferring on the possessor a title good against all men. He might expect too that in a system rich in definite forms of action, some possessory some proprietary, the outcome of different ages, these effects would be very complicated; and certainly he would not be disappointed. He would, for example, find the ousted owner gradually losing his remedies one by one, first the remedy by self-help, then the possessory assizes, then the writs of entry, lastly the very writ of right itself. He would here find much to puzzle him, for the rules as to the conversion of a right of entry into a right of action seem to us quaint and arbitrary. Still all these manifold and complex effects of possession and dispossession, seisin and want of seisin, are of a kind known and intelligible, partly due to formalities of procedure and statutory caprices, but tending in the main to protect the possessor in his possession and uphold the public peace against violent assertions of proprietary right; analogies may be found in other systems of law modern as well as ancient.

But this is far from all. Seisin has effects of a quite other kind. The owner who is not seised not only loses remedies one by one but he seems hardly to have ownership, and this, not because all lands are held of the king, but because as regards such matters as the alienation, transmission, devolution of his rights he seems to be in a quite different position from that in which we should expect to find a person who, though he has not possession, has yet ownership. Let a few rules be repeated that were law until but a short while since. They are well known, but it may be worth while to put them together, for they make an instructive whole.

(1) Until the 1st of October 1845, a right of entry could not be alienated among the living[1]. In other words, the owner who is not seised has nothing to sell or to give away.

An explanation of this rule has been found in the law's dislike of maintenance. It may be given in the words of Sir James Mansfield:—'Our ancestors got into very odd notions on these subjects, and were induced by particular causes to make estates grow out of wrongful acts. The reason was the prodigious jealousy which the law always had of permitting rights to be transferred from one man to another, lest the poorer should be harassed by rights being

[1] 8 & 9 Vict. c. 106, sec. 6.

transferred to more powerful persons[1].' This bit of rationalism is of respectable antiquity; it is certainly as old as Coke's day[2]; and true it is that at one time our laws did manifest a great, but seemingly most reasonable[3], jealousy of maintenance and champerty, of bracery and the buying of pretenced titles. But still the explanation seems insufficient. Its insufficiency will be best seen when we pass to some other rules. In passing, however, let us notice how deeply rooted in our old law this rule must be. We come upon it directly we ask the simplest question as to the means of transferring ownership. What is the one 'assurance,' the one means of passing ownership, known to the common law? Why, if we leave out of account litigious proceedings real or fictitious, it is the feoffment, and there must be livery of seisin, that is, delivery of possession. One cannot deliver possession to another when a third person is possessing; so a right of entry cannot but be inalienable. Or put it this way: our old law has an action which is thoroughly proprietary, which raises the question of most mere right, the writ of right, the only hope of one who cannot base his claim on a recent possession. Yet even in the writ of right the demandant must count upon his own seisin or on the seisin of some ancestor, and thence deduce a title by descent; he cannot count on the seisin of a donor or vendor, 'for the seisin of him of whom the demandant himself purchased the land availeth not[4].' This is a rule which can be traced from Coke to Bracton[5], a rule of procedure, be it granted, but a rule which shows plainly that he who has no seisin has nothing that he can give to another. But to this matter of alienation *inter vivos* we will return.

(2) Before the 1st of January 1838[6] a right of entry could not be devised by will. About devises of course we cannot expect much ancient common law. The question depended on the meaning of the statutes of 1540[7] and 1542[8]; but the manner in which these statutes were interpreted is worthy of note. Throughout the verb used of the person who is empowered to make a will is the verb *to have*. The person who *has* any manors, lands, tenements or hereditaments may dispose of them by will. But though some modern judges did not much like the interpretation, still the old interpretation was that the disseised owner *has* not any land, tenement, or hereditament, and therefore has nothing to leave by his will[9]. A

[1] *Goodright* v. *Forrester*, 1 Taunt, 613.
[2] Co. Lit. 213 b; *Lampet's Case*, 10 Rep. 48 a.
[3] Stubbs, Const. Hist. § 295.
[4] Co. Lit. 293 a. [5] Bracton, f. 376.
[6] 1 Vic. cap. 26. sec. 3. [7] 32 Hen. VIII, cap. 1. [8] 34 Hen. VIII, cap. 5.
[9] The cases are collected in Jarman on Wills, 4th ed., vol. 1, pp. 49, 50. Perhaps they leave open some questions which will never now be answered. But the main doctrine seems beyond dispute. See Co. 3 Rep. 35 a.

case from the year 1460 shows plainly that before the statutes a similar rule prevailed; to give validity to a devise under local custom it was essential that the testator should die seised, though it was doubted whether he need be seised when making the will[1].

(3) Until the 1st of January 1834[2] *seisina fecit stipitem*. Now this when duly considered seems a very remarkable rule, for it comes to this, that a landowner who has never been in possession has no right that he can transmit to his heir, or in other words, that ownership is not inheritable. Such a person may be (to use a venerable simile) the passive 'conduit-pipe' through which a right will pass, but no one shall ever get the land by reason that he was this man's heir; a successful claimant must make himself heir to one who was seised. But what explanation have we for this? A fear of maintenance very obviously fails us, and as it seems to me feudalism must fail us also, unless we are to suppose a time when seisin meant not mere possession but possession given, or at least recognized, by the lord of the fee. But for imagining any such time we have no warrant. It seems law from the first that the rightful tenant can be disseised, though the lord be not privy to the disseisin, and that the disseisor will be seised whether the lord like it or no.

And to constitute a new stock of descent a very real possession was necessary. The requisite seisin was not a right which could descend from father to son; it was a pure matter of fact. Even though there was no adverse possessor, even though possession was vacant, the heir was not put into seisin by his ancestor's death; an entry, a real physical entry, was necessary. We all know the old story of the man who was half inside half outside the window, and who was pulled out by the heels. It was certainly a nice problem whether he possessed *corpore* as well as *animo*; but at any rate on this depended the question whether he had been seised and could maintain the novel disseisin against those who extracted him[3].

(4) The Dower Act of 1833[4] for the first time gave a widow dower of a right of entry; but for that statute the widow of one who has not been seised goes unendowed. It is true that in this case 'a seisin in law or a civil seisin' would answer the purpose of 'a seisin in deed[5].' But this 'seisin in law' only existed when possession was in fact vacant. A man was seised neither in fact nor yet in law if some other person had obtained and was holding seisin. If such an one did not get seisin during the coverture his wife would get no dower.

[1] Y. B. 39 Hen. VI. f. 18 (Mich. pl. 23).
[2] 3 & 4 Will. 4. c. 106; Co. Lit. 11 b.
[3] 8 Ass. f. 17, pl. 27.
[4] 3 & 4 Will. 4. cap. 105.
[5] Co. Lit. 31 a.

Here it may be remarked that seisin did to some extent become a word with many meanings or rather shades of meaning. The seisin which is good enough for one purpose is insufficient for another. 'What shall be said a sufficient seisin' to give dower, to give curtesy, to constitute a stock of descent, to maintain a writ of right [1]—each of these questions has its own answer. But I believe that the variations are due (1) to the treatment of cases in which no one has corporeal possession of the lands, and (2) to the application of the idea of possession to subjects other than lands, namely, the incorporeal hereditaments, an application which must necessarily be difficult and may easily be capricious. No fictitious seisin in law was, so far as I am aware [2], ever attributed to one who however good his title was clearly dispossessed, to one whose land was being withheld from him by a stranger to the title. And the 'seisin in law' may well set us thinking. When we hear that *A* is *B* in law we can generally draw an inference about past history:—it has been found convenient to extend to *A* a rule which was once applied only to things which were *B* in deed and in truth; in short, there was a time when *A* was not *B* even in law. For a few but by no means all purposes we may say with the old French lawyers, 'le mort saisit le vif;' the seisin in law would, e.g. give dower, but it would not make a stock of descent.

(5) To give a husband curtesy seisin during the coverture was necessary. This rule has never yet been abolished, though it has been somewhat concealed from view both by Equity and by statutes.

So far we have been concerned with rules which are still generally known, and one of them, the rule about curtesy, has not yet become a matter for the antiquary. It now becomes desirable to glance at some obscurer topics. Since we are sometimes assured that in one way or another the strange effects of seisin and want of seisin are due to feudalism, we ought to ask how the rights of a lord were affected by the fact that 'the very tenant,' the true owner, was out of seisin and some other person in seisin.

Suppose tenant in fee simple is disseised and then dies without an heir, what can be plainer on feudal principles (feudal principles as understood in these last times) than that the land will escheat to the lord, that the lord will be able to recover the land from the disseisor or from any person who has come to the land through or under the disseisor? But such was not the law even in the last, even in the present century, and if it be law now, a point about which I had rather say nothing, this must be the

[1] Co. Lit. 15 b, 29 a, 31 a, 181 a.

[2] It may be more to the point that Mr. Challis (Real Property, p. 182) has written to the same effect. See *Leach* v. *Jay*, 9 C. D. 42.

result either of the statutes which have deprived feoffments and descents of their ancient efficacy or else of a convenient forgetfulness. In Coke's day it seems to have been settled that from the original disseisor the lord could obtain the land either by entry or by action (writ of escheat), provided that he had not accepted the disseisor as tenant. If however before the death of the disseisee the disseisor made a feoffment in fee, or died seised leaving an heir, there was no escheat at all, 'because the lord had a tenant in by title;' he had, that is, a tenant who could not personally be charged with any tort. Of a right of action, as distinguished from a right of entry, there was no escheat; 'such right for which the party had no remedy but by action only to recover the land is a thing which consists only in privity, and which cannot escheat nor be forfeited by the common law[1].' What is more, it had been held that the most sweeping general words in acts of attainder would not transfer such rights to the crown; they were essentially inalienable, intransmissible rights.

But if we go behind Coke we find that so far from the law having been gradually altered to the detriment of the lords, if altered at all it had been altered to their profit. We come to a time when there seems the greatest uncertainty whether the lord can get the land from the very disseisor. The writ of escheat, his only writ, distinctly says that his tenant has died seised. I do not wish to dogmatize about a very obscure history, but it will be enough to say that under Henry VII Brian C. J. denied that the lord could enter or bring action against the disseisor[2].

It was so with the other feudal casualties. Coke says[3] that if the disseisee die having still a right of entry and leave an heir within age the lord shall have a wardship. Doubtless the law was so in his day, but the earliest authority that he cites is from the reign of Edward III and to this effect—'In a writ of ward it is a good plea that the ancestor of the infant had nothing in the land at the time of his death; for if he was disseised the lord shall *not* have a wardship, neither by writ of ward nor by seizing him

[1] *Winchester's Case*, 3 Rep. 2 b.

[2] It may be convenient if I here collect in chronological order the main authorities as to escheat and forfeiture of rights of entry and rights of action. Reg. Brev. f. 164 (F. N. B. f. 144); 27 Ass. pl. 32. f. 136, 137; Fitz. Abr. *Entre Congeable*, pl. 38 (Hil. 2. Ric. 2); 2 Hen. 4. f. 8 (Mich. pl. 37); 7 Hen. 4. f. 17 (Trin. pl. 10); 32 Hen. 6. f. 27 (Hil. pl. 16), comp. Litt. sec. 390; 37 Hen. 6. f. 1 (Mich. pl. 1); 15 Edw. 4. f. 14 (Mich. pl. 17), per Brian; 6 Hen. 7. f. 9 (Mich. pl. 4); 10 Hen. 7. f. 27 (Trin. pl. 13); 13 Hen. 7. f. 7 (Mich. pl. 3); Bro. Abr. *Eschete*, pl. 18; Co. Lit. 240 a, 268 a, b; 3 Inst. 19; 3 Rep. 2, 3, 35 a; 8 Rep. 42 b; Hale, P. C. Part I, ch. 23; Hawk, P. C. Bk. 2, ch. 49, sec. 5: *Burgess* v. *Wheate*, Eden, 177, 243. It will be noticed that none of these authorities, except perhaps the writ in the Register, is older than the middle of the fourteenth century.

[3] 3 Rep. 35 a; Co. Lit. 76 b.

[the heir], until the tenancy is recontinued[1].' But at all events of a right of action there was no wardship. On the other hand, if the disseisor died without an heir the lord got an escheat, if the disseisor died leaving an infant heir the lord got a wardship, though in either case his rights were defeasible by the disseisee. In short, the lord must take his chance; it is no wrong to him if his tenant be disseised; he cannot prevent this person or that from acquiring seisin, yet thus he may be a great loser or a great gainer. The law about seisin pays no regard to his interests.

There is another side to the picture we have here drawn. He who is seised, though he has no title to the seisin, can alienate the land; he can make a feoffment and he can make a will (for he who *has* land is enabled to devise it by statute), and his heir shall inherit, shall inherit from him, for he is a stock of descent; and there shall be dower and there shall be curtesy, and the lord shall have an escheat and the king a forfeiture, for such a one has land 'to give and to forfeit.' This may make seisin look very much like ownership, and in truth our old law seems this (and has it ever been changed[2]?) that seisin does give ownership good against all save those who have better because older title. Nevertheless we err if we begin to think of seisin as ownership or any modification of ownership; after all it is but possession. A termor was not seised, but certainly he could make a feoffment in fee and his feoffee would be seised. This seems to have puzzled Lord Mansfield[3], and puzzling enough it is if we regard seisin itself as a proprietary right, for then the termor seems to convey to another a right that he never had. But when it is remembered that substantially seisin is possession, no more, no less, then the old law becomes explicable. My butler has not possession of my plate, he has but a charge or custody of it; fraudulently he sells it to a silversmith; the silversmith now has possession: so with the termor, who has no seisin, but who by a wrongful act enables another to acquire seisin.

But, it will be urged, the termor's feoffee (here is the difficulty) acquires an estate in fee simple and no less estate or interest. Certainly, and what of the silversmith who buys of the fraudulent butler? He has possession, and in a certain sense he possesses as owner; he claims no limited interest, such as that of a bailee, in the goods. How his rights would best be described at the present day we need not discuss, but it seems plausible to say

[1] Fitz. Abr. *Garde*, pl. 10.

[2] See *Asher* v. *Whitlock*, L. R. 1 Q. B. 1. Holmes, Common Law, p. 244.

[3] I refer of course to *Taylor* v. *Horde*, 1 Burr. 60, a case which profoundly dissatisfied the great conveyancers of the last century, and which has lately put Mr. Challis to his Greek (Real Property, p. 329). Butler's note on this case (Co. Lit. 330 b) seems to me the best modern account of seisin that we have.

that at least if an innocent purchaser, he has ownership good against all save those who have better because older title[1]. Regarded from this point of view the termor's tortious feoffment is no anomaly. It is true that in our modern law there may be nothing very analogous to the process whereby an infirm title gained strength as it passed from man to man, the ousted owner losing the right to enter before he lost the right of action; still it is conceivable that in the interests of public peace law should, for example, permit me to take my goods by force from the thief himself, but not from one to whom the thief has given or sold them, nor from the thief's executor. Thus would my entry be tolled and I should be put to my action[2].

But this by the way, for the position of the non-possessed owner is more interesting and less explicable than that of the possessed non-owner. Now we seem brought to this, that ownership, mere ownership, is inalienable, intransmissible; neither by act of the party nor by act of the law will it pass from one man to another. The true explanation of the foregoing rules will I believe be found in no considerations of public policy, no wide views of social needs, but in what I shall venture to describe as a mental incapacity, an inability to conceive that mere rights can be transferred or can pass from person to person. Things can be transferred; that is obvious; the transfer is visible to the eye; but how rights? you have not your rights in your hand or your pocket, nor can you put them into the hand of another nor lead him into them and bid him walk about within their metes and bounds. 'But,' says the accomplished jurist, 'this is plain nonsense; when a gift is made of a corporeal thing, of a sword or a hide of land, rights are transferred; if at the same time there is a change of possession, that is another matter; whether a gift can be made without such a change of possession, the law of the land will decide; but every gift is a transfer of ownership, and ownership is a right or bundle of rights; if gift be possible, transfer of rights is possible.' That, I should reply, doubtless is so in these analytic times; but I may have here and there a reader who can remember to have experienced in his own person what I take to be the history of the race, who can remember how it flashed across him as a truth, new though obvious, that the essence of a gift is a transfer of rights. You

[1] Holmes, Common Law, p. 241.

[2] Coke (Co. Lit. 245 b) says that 'by the ancient law' the entry of the disseisee was tolled not only by a descent cast, but by the disseisor's feoffment followed by non-claim for year and day. There was very similar law both in France and in Germany, as may be seen at large in Laband, *Die Vermögensrechtlichen Klagen* and Heusler, *Die Gewere*. I have never been able to find definite authority for Coke's statement, but it looks to me very probable. It deprives the descent cast of its isolated singularity, and fits in with the learning of fines.

cannot give what you have not got:—this seems clear; but put just the right accent on the words *give* and *got*, and we have reverted to an old way of thinking. You can't give a thing if you haven't got that thing, and you haven't got that thing if some one else has got it. A very large part of the history of Real Property Law seems to me the history of the process whereby Englishmen have thought themselves free of that materialism which is natural to us all.

But it will be said to me that this would-be explanation is untrue, or at best must take us back to a merely hypothetical age of darkness, because from time immemorial there were rights which could be transferred from man to man without any physical transfer of things, namely, 'the incorporeal hereditaments which lay in grant and not in livery.' In truth however the treatment which these rights receive in our oldest books is the very stronghold of the doctrine that I am propounding. They are transferable just because they are regarded not as rights but as things, because one can become not merely entitled to, but also seised and possessed of them, corporeally seised and possessed. Seisin, it may be, cannot be delivered; I cannot put an advowson into your hand, nor can an advowson be ploughed and reaped; nevertheless the gift of the advowson will be far from perfect until you have presented a clerk who has been admitted to the church. In your writ of right of advowson you shall count that on the presentation of yourself or your ancestor a clerk was admitted, nay more, that your clerk exploited the church, took esplees thereof in tithes, oblations and obventions to the value of so many shillings[1]. But we may look at a few of these things incorporeal a little more closely.

And first then of seignories, reversions, remainders. These, it is said, lie in grant. But for all that the tenant of the land must attorn to the grantee; the attornment is necessary to perfect the transfer of the right. Such was the law in 1705[2]. Whence this necessity for an attornment?

It may be replied:—Here at all events is a feudal rule. Just as (before the beginning of clear history) the tenant could not alienate the land without the lord's consent, so in the reign of Queen Anne

[1] *Capiendo inde expleta*; this phrase conveys a sense of manifest and successful achievement. When the possessor takes a crop from his land, he achieves, exploits his seisin; his seisin is now explicit. See Skeat, s. v. *explicit, exploit*. There is a great mass of information in Ducange, s. v. *expletum*. Coke, 6 Rep. 58, gives almost the true meaning, though his etymology is at fault; he derives the word from *expleo* (instead of *explico*) and says that the grantee of a rent hath not a perfect and explete or complete estate until he hath reaped the esplees, *scilicet* the profit and commodity thereof.

[2] 4 & 5 Ann. c. 16. sec. 9.

the lord could not alienate the seignory without the tenant's attornment. There was a personal bond between lord and vassal; the need of attornment is to start with the need of the tenant's consent, though certainly in course of time he could be compelled to give that consent.

Now it may not be denied that in this region feudal influence was at work. To deny this one must contradict Bracton. But the sufficiency of the explanation should not be admitted until some text of English law is produced which says that the tenant can as a general rule refuse consent to an alienation. Bracton does say that except in exceptional cases there can be no transfer of *homage* unless the tenant consents; on the other hand he says that all other services can be transferred and the tenant shall be attorned *velit nolit*[1]. It is of course possible to regard this state of things as transitional, to urge that in Bracton's day the tenant had already lost a veto on alienation that he once had; but before we adopt this theory let us see how much less ground it covers than the rules which have to be explained.

(*a*) The doctrine of attornment holds good not only of a seignory and of a reversion but of a remainder also[2]; but between the remainderman and the tenant of the particular estate there is no tenure, no feudal bond.

(*b*) Much the same doctrine holds good when what has to be conveyed is the land itself (immediate freehold) but that land is in lease for years. Here the transfer can be made in one of two ways. There may be a grant and then attornment will be necessary[3], or there may be a feoffment. But if there is to be a feoffment, either the termor must be a consenting party or he must be out of possession[4]. If the termor chooses to sit upon the land and say 'I will not go off and I will not attorn myself,' there can be no effectual grant, no effectual feoffment; recourse must be had to a court of law. But surely it will not be said that in the days of true feudalism, when, as we are told, the termor was regarded much as his landlord's servant, he had a legal right to prevent his landlord from selling the land?

(*c*) The doctrine of attornment holds good of rents not incident to tenure[5]. The terre-tenant will not hold of the grantee of the rent, nevertheless he must attorn if the grant is to have full efficacy. Indeed the learning of rents as it is in Coke[6], and even as it is at the present day, seems to me very suggestive of an ancient mode of

[1] Bract. f. 81 b, 82. The writs for compelling attornment are the *Quid juris clamat* and the *Per quae servitia*.
[2] Co. Lit. 309 a; Lit. sec. 569.
[3] Lit. sec. 567.
[4] Co. Lit. 48 b; *Bettisworth's Case*, 2 Rep. 31, 32.
[5] Co. Lit. 311 b.
[6] *Brediman's Case*, 6 Rep. 56 b.

thought. The rent is regarded as a thing, and as a thing which has a certain corporeity (if I may so speak); you may be seised, physically possessed of it; you have no actual seisin until you have coins, tangible coins, in your hand. On getting this actual seisin much depended; in modern times a vote for Parliament[1]. An attornment would give you a fictitious 'seisin in law;' nothing but hard palpable cash would give you seisin in fact. Such an incorporeal hereditament as a rent can be given by man to man just because it occasionally becomes corporeal under the accidents of gold or silver; this seems the old theory.

Now as to attornment, a valuable analogy lies very near to our hands. Suppose that we shut Coke upon Littleton and open Benjamin on Sales. Describing what will be deemed an 'actual receipt' of sold goods within the meaning of the Statute of Frauds, Mr. Benjamin writes thus:—'When the goods, at the time of the sale, are in the possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. . . . . All of the parties must join in the agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent[2].' This is familiar law, and surely it explains much. Baron Parke used a very happy phrase when he said that there is no 'actual receipt' by the buyer 'until the bailee has attorned, so to speak' to the buyer, a happy phrase for it explained the obscure by the intelligible, the old by the modern[3].

Without transfer of a thing there is no transfer of a right.

Starting with this in our minds, how, let us ask, can a reversioner alienate his rights when a tenant for life is seised, how can a tenant in fee simple alienate his rights when there is a termor on the land? There is but one answer. The person who has the thing in his power must acknowledge that he holds for or under the purchaser. If he does this, then we may say (as we do say when construing the Statute of Frauds) that the purchaser has 'actually received' the thing in question. It is I admit difficult to carry this or any other theory through all the intricacies of our old land law. The fact that in course of time there came to be two legally recognized possessions, first the old-fashioned possession or seisin

[1] *Orme's Case*, L. R., 8 C. P. 281; *Hadfield's Case*, ibid. 306. The last Reform Act (48 Vict. c. 3, sec. 4) has, one regrets to say, made it improbable that we shall have in the future similar displays of antique learning.

[2] Benjamin, Sales, 2nd ed., p. 132.

[3] *Farina* v. *Home*, 16 M. & W. 119. I believe that it was Parke, B. who first introduced the term 'attornment' into the discussion of cases concerning the sale of goods; but in this I may be wrong.

which no termor can have (*possessio ad assisas*), and then the new fashioned possession which a termor can have (*possessio ad breve de transgressione*), complicates what, to start with, may have been a simple notion[1]. But the clue is given us in some words of Britton:—tenant in fee wants to alienate his land, but there is a farmer in possession; until the farmer attorns there can be no conveyance, *car la seisine del alienour sei continue touz juirs par le fermer, qui use sa seisine en le noun le lessour*[2]; the seisin is held for the alienor until the farmer consents to hold it for the alienee. So when the person on the land is tenant in fee simple, here doubtless he is seised on his own behalf, seised in demesne, but the overlord also is seised, seised of a seignory, or, as the older books put it, he holds the land in service (*non in dominico sed in servicio*); he holds the land by the body of his tenant; he can only transfer his rights if he can transfer seisin of the seignory; he transfers seisin when the tenant admits that he is holding under a new lord[3]. So with a rent which 'issues out of the land;' we cannot make a rent issue out of land, or turn the course of a rent already issuing, unless we can get at the land; if some one else has possession of the land, it is he that has the power to start or to divert the rent. This phrase 'a rent issuing out of land' would seem to us very wonderful and very instructive, had we not heard it so often. What a curious materialism it implies!

Bracton's whole treatment of *res incorporales* shows the same materialism, which is all the more striking because it is expressed in Roman terms and the writer intends to be very analytic and reasonable. *Jura* are incorporeal, not to be seen or touched, therefore there can be no delivery (*traditio*) of them. A gift of them, if it is to be made at all, must be a gift without delivery. But this is possible only by fiction of law. The law will feign that the donee possesses so soon as the gift is made and although he has not yet made use of the transferred right. Only however when he has actually used the right does his *possessio* cease to be *fictiva* and become *vera*, and then and then only does the transferred right become once more alienable[4].

Of all these incorporeal things by far the most important in Bracton's day and long afterwards was the advowson in gross, and

[1] I have framed my Latin phrases on the model of Savigny's *possessio ad interdicta*. Seisin, we may say, is 'assize-possession.'

[2] Britton, vol. 2, p. 303.

[3] I am not sure that it was ever technically correct to say that the overlord is seised of the land; but in thirteenth century cases, he certainly has and holds the land, he has and holds it not in demesne, but in service. See Br. f. 432, 433. I have seen many cases to this effect; and I have seen *nunquam aliquam seisinam habuit nec in dominico nec in servicio.*

[4] Bracton, f. 52 b.

happily he twice over gives us his learning as to its alienability with abundant vouching of cases[1]. To be brief:—If *A* seised of an advowson grants it to *B*, and then the church falls vacant, *B* is entitled to present. Thus far have advowsons become detached from land. But if before a vacancy *B* grants to *C*, and then the parson dies, who shall present? Not *C*, nor *B*, but *A*. Not *C*, for though *B* had a quasi-possession when he made the grant he had no real possession, for he had never used the transferred, or partially transferred, right; he had nothing to give; he had nothing. Not *B*, for whatever inchoate right he had he has given away. No, as before said, *A* shall present, for the only actual seisin is with him. One has not really got an advowson until one has presented a clerk and so exploited one's right.

We may take up the learning of advowsons some centuries later. The following comes from a judgment not unknown to fame, the judgment of Holt in *Ashby* v. *White*[2]. He is illustrating the doctrine that want of remedy and want of right are all one. 'As if a purchaser of an advowson in fee simple, before any presentment, suffer an usurpation and six months to pass without bringing his *quare impedit* he has lost his right to the advowson, because he has lost his *quare impedit* which was his only remedy; for he could not maintain a writ of right of advowson; and although he afterwards usurp and die and the advowson descend to his heir, yet the heir cannot be remitted, but the advowson is lost for ever without recovery.' So, as I understand, stood the law before the statute 7 Ann. c. 18. It comes to this, that if the grantee who has never presented suffers a usurpation, and does not at once use a special statutory remedy[3], his right, his feeble right, has perished for ever. Writ of right he can have none, for he cannot count on an actual seisin. Very precarious indeed at Common Law was the right of the grantee who had not yet acquired what could be regarded as a physical corporeal possession of a thing. Indeed when we say that these rights lay in grant we use a phrase technically correct, but very likely to mislead a modern reader.

Space is failing or I would speak of franchises, for even to negative franchises, such as the right to be quit of toll, does Bracton apply the notion of seisin or possession; and the more the history of the incorporeal hereditaments is explored, the plainer will it be that according to ancient ideas they cannot be effectually passed from person to person by written words: there is seisin of them,

[1] Bracton, f. 54, 55, 246. See Nichols, Britton, vol. 2, p. 185, note f.
[2] Ld. Raym. 938, 953.
[3] Stat. Westm. the Second (13 Edw. I), c. 5. The law is clearly stated by Blackstone, vol. 3, p. 243.

possession of them, no complete conveyance of them without a transfer of possession, which, when it is not real must be supplied by fiction. But now if we put together all the old rules to which reference has here been made (and I will ask my readers to fill with their learning the many gaps in this brief argument), does it not seem that these 'very odd notions' of our ancestors, which Sir James Mansfield ascribed to 'particular causes,' were in the main due to one general cause? They point to a time when things were transferable and rights were not. Obviously things are transferable, but how rights?

And here let us remember the memorable fact that the *chose in action* became assignable but the other day. The inalienability of the benefit of a contract, like the inalienability of the rights of the disseised owner, has been set down to that useful, hard-worked 'particular cause,' the prodigious jealousy of maintenance. The explanation has not stood examination in the one case[1], I doubt it will stand examination in the other. According to old classifications the benefit of a contract and the right to recover land by litigation, stand very near each other. The land-owner whose estate has been 'turned to a right' (a significant phrase) has a thing in action, a thing in action real. There is a contrast more ancient than that between *jus in rem* and *jus in personam*, namely, that between right and thing. Of maintenance there is, I believe, no word in Bracton's book, but that there can be no *donatio* without *traditio* is for him a rule so obvious, so natural, that it needs no explanation, though it may be amply illustrated by cases on the rolls. What the thirteenth century learned of Roman law may have hardened and sharpened the rule, but it seems ingrained in the innermost structure of our law.

I am far from saying that within the few centuries covered by our English books it has ever been strictly inconceivable that a right should be transferred without some transfer of a thing, or without some physical fact which could be pictured as the use of a transferred incorporeal thing. Should it even be proved that the Anglo-Saxon charter or 'book' passed ownership without any transfer of possession, this will indeed be a remarkable fact, but far from decisive, particularly if the proof consist of royal grants. The king in council may have been able to do many marvellous feats not to be done by common men, and we know that ages before the year 1875 the king could assign his chose in action. But old impotencies of mind give rise to rules which perdure long after they have ceased to be the only conceivable rules, and then new justifications have to be found for the wisdom of the ancients, here

[1] Pollock, Principles of Contract, 4th ed., Appendix, Note G.

feudalism, there a dread of maintenance, and there again a hatred of simony. So long as the rules are unrepealed this rationalizing process must continue; judges and text-writers find themselves compelled to work these archaisms into the system of practical intelligible law. Only when the rules are repealed, when we can put them all together and look at them from a little distance, do they begin to tell their true history. I have here set down what seems to me the main theme of that history. For this purpose it has been necessary to speak very briefly and superficially of many different topics, about every one of which we have a vast store of detailed and intricate information. Before any theory such as that here ventured can demand acceptance, it must be stringently tested at every point and other systems of law besides the English should be considered. But it seemed worth while to draw notice to many old rules of law which we do not usually connect together, and to suggest that they help to explain each other and are in the main the outcome of one general cause[1].

F. W. MAITLAND.

[1] There is one rule of our present Common Law which, were it very old, would make much against what I have said, the rule, namely, that the ownership of movables can be transferred by mere agreement, by bargain and sale without delivery. I have not forgotten this, but it seemed impossible to discuss in a paper already too miscellaneous a question which has divided two masters of the Year Books. Serjeant Manning has maintained that the rule is quite modern. Lord Blackburn, on the other hand, has found it in the books of Edward the Fourth. He was not concerned, however, to trace it any further, and it seems to me that the law of an earlier time required a change of possession on the one side or the other, delivery or part-delivery of the goods, payment or part-payment of the price. Perhaps at some future time I may be allowed to state what I have been able to find about this matter. Since this article was in print examples (A. D. 1305) of pleadings referring to the seisin of chattels have been brought to my notice by Mr. G. H. Blakesley: see Registrum Palatinum Dunelmense (ed. Hardy), vol. 4, pp. 45, 49, 63, 73.

THE ORIGIN OF THE LOVAT MYTH.

IN the following remarks on the strange case presented to the Committee for Privileges of the House of Lords in 1885 by Mr. John Fraser of Carnarvonshire, I refer throughout to the report at p. 763 et seq. of Law Reports, 10 Appeal Cases; and do not, therefore, give more than a brief outline of the facts which there appear. My object in this article is simply to suggest a way in which the legend—for it was no more—propounded by the petitioner can have arisen; since ordinary people, not being lawyers, are apt to say on hearing such a story, *Credimus quia impossibile;* how could the tradition in the claimant's family exist unless it were true? (See the remarks of Lord Bramwell at p. 806 of the report.)

The claimant's case, stated very shortly, amounted to this. When the well-known Simon Fraser, who was executed in 1747, assumed the title of Lord Lovat, the person rightfully entitled to that honour and dignity was his elder brother, Alexander Fraser, commonly called Alexander of Beaufort (see the report *passim*). This Alexander raised a body of men to join Lord Dundee in 1689, and some time afterwards, having killed a fiddler at a wedding, fled for his life and found refuge in a Welsh mine. He became a miner, married, lived and died in Wales, leaving a son, John Fraser, born in 1740, from whom the petitioner was descended: the date of the death of Alexander of Beaufort was 1776.

The petitioner may be taken to have proved his descent from an Alexander 'Freser' or 'fereser,' who died in Wales in the year last-mentioned; but in Lord Bramwell's words at p. 802, his own evidence showed 'that there were two men, and that the Alexander who died in 1776 was not the Alexander who was the son of Thomas of Beaufort,' the father of both Alexander of Beaufort and of Simon Lord Lovat. This being so, the claim necessarily failed; and, as the noble and learned Lords who heard it pointed out with a cogency which, if I may respectfully say so, was overwhelming, a case which requires a person who admittedly died so late as 1776 to have been a grown man in 1689, almost refutes itself as soon as it is stated.

How, then, could the claimant's story ever have arisen? This, and this only, is what I propose to discuss. If we may venture to depart from the legal rules of evidence, and to ask, not what can be substantiated in a Court of Law, but what did in all probability

happen, we shall, I think, find in the mass of hearsay gossip laid by Mr. Fraser before the Committee for Privileges two traditions, current in the Lovat family, which are exceedingly likely to have been true in fact. Lovat traditions, strictly so called, must throughout be carefully discriminated from traditions of the petitioner's ancestors in Wales. Both these traditions were told by the same person, the legitimate son of Simon Lord Lovat, who was, for some years before his death, which did not take place till 1815, the recognised head of the Fraser family; and who, therefore, may be presumed to have been specially informed as to the family history. I assume that both these traditions were true; but it was incumbent on the petitioner not merely to establish both legally, but also to show that both referred to the same man. The rules of law disabled him from taking the first step; the form of the traditions themselves, I submit, makes the second step impossible.

The first tradition is given at pp. 767–773 of the report, where it appears that on the 5th of May, 1826, there were reduced into writing statements tending to show that there was a story in the Lovat family, told among other persons by the nephews of Alexander of Beaufort, who were the sons of Simon Lord Lovat, that their uncle Alexander had killed a fiddler. The date of the murder is not given, but the period referred to is about 140 years before the statement was written down. Although this story could not be legally proved, as their Lordships showed, yet it may well have been true. Highlanders at the end of the seventeenth century were like Shakespeare's thieves, 'men who would strike sooner than speak,' and habitually drew steel on the bare suspicion of an affront; the leading members of a clan, besides, were precisely the men to be most punctilious in matters of honour. I may refer, for instance, to Macaulay's account of the demeanour of Macdonald of Glengarry, who, as well as Alexander of Beaufort, brought his men to fight under Lord Dundee, and his jealousy of Cameron of Lochiel.

The Frasers, no doubt, in 1689 regarded it as right and proper that Alexander of Beaufort, who in the natural course of events would become their chief, should put to death a mere musician, who had insulted him; and if the musician were not a member of the clan, as to which point nothing is stated, no Fraser would give the matter a moment's thought. Highland feeling, moreover, was not then very far removed from what prevailed in London at the same time, as may be seen from the trial of Lord Mohun in William the Third's reign, for assisting Captain Hill to brutally murder Will Mountford the actor. 'After all,' said a noble peer who sat to try Lord Mohun, 'he was but a player; and players are rogues.'

The second tradition is at p. 775, where we find another statement, to the effect that the same son of Simon Lord Lovat had said that 'One of the heirs had committed a fault for which he fled the country and went to Wales, and was in a mine there.' The speaker is said to have added, 'When my bones are so dry that they may be turned into whistles, this man's heirs may come back and claim my lands.'

By 'one of the heirs' is obviously meant 'a member of the family, one who could prove himself a Fraser.' But, as Lord Blackburn says at p. 776, there is nothing here to point to this man who had fled the country being the man who had killed the fiddler, and unless this could have been proved, the claimant's case was not furthered by the above statement. This story may also have been true; but we need not suppose that both stories point to the same person. On the contrary, one would from their tenor naturally infer that they were related of two different members of the family.

So far, then, I suggest that we have in the Lovat family two traditions, neither provable in law, but both very likely to be true, and both vouched for by the son of Simon Lord Lovat, who was the nephew of Alexander of Beaufort. These two stories, however, if true, are almost certainly told of two persons, not of one: see generally pp. 775–777.

Next we come to an attempt to connect these two stories, and to attach them both to the same person. On p. 784 there is a statement appearing to have been made by Simon Fraser, the illegitimate son of Simon Lord Lovat, in October 1823. He said that his father's brother Alexander killed a man, and then fled to Wales, where he died without male issue. As Lord Selborne points out at p. 785, this Simon could have had no personal knowledge of these facts; and was not, strictly speaking, a member of the family, so that on that ground also he was not a competent witness. I submit that his statement is a pure inference that the two traditions referred to the same man; this inference, no doubt, was made by him *bonâ fide*. Simon Fraser, who gave evidence in 1823, and seems to have been born about 1740 (it will be remembered that his putative father, Lord Lovat, was executed in 1747), had obviously no direct knowledge of the state of the Highlands before the Rebellion of 1745; and it is not wonderful that he should fail to realise the vast difference between the old days of disturbance and outrage, when his own father and grandfather (see p. 794) maintained their position with a strong hand, and successfully repelled the attempts of the officers of justice to arrest them, and the peace and order in which he had himself been brought up and had lived all his life, after the English Government had broken up the clan system and

power. This Simon Fraser, remembering Invernesshire as he had himself always known it, naturally could not conceive a murderer going at large and unpunished; and when he put together the two propositions, that his uncle Alexander of Beaufort had slaughtered a man and yet had died in his bed, it is not strange that he should at once conclude, Then he must have saved himself by flight. Having got so far, to assume that his uncle Alexander was the nameless member of the family who was known to have fled to, and to have settled in, Wales was inevitable.

We have, however, seen that both stories were told by Lord Lovat's legitimate son, the head of the family and the nephew of Alexander of Beaufort; and the fact that he made no suggestion that both stories related to the same person, seems very strong proof that their heroes were really different persons, and that Simon Fraser's inference, though made in good faith, was purely groundless.

Moreover, assuming that Alexander of Beaufort did kill the fiddler, as I have already done, it was, I submit, demonstrated that he was dead before the end of the seventeenth century, in which case he could hardly have settled in Wales. See at p. 788 the entry of his death in the bill of mortality, and at p. 792 what Lord Blackburn says as to the prosecution of Simon Lord Lovat by the Crown before he succeeded to the title. To Lord Blackburn's remarks I may venture to add that if Alexander had been alive at the time of that prosecution, his brother Simon might have escaped punishment on the ground of a misnomer in the indictment, which described him as Captain Simon the younger of Beaufort, which (as Lord Blackburn shows) he would be if Alexander were dead, but which he would not be if Alexander were alive. I have seen in some Scottish Peerage or County History (to which unfortunately I cannot more precisely refer), that about the time of this prosecution, namely, the beginning of the eighteenth century, the Lord Forbes of Pitsligo, arraigned for complicity in some rising, was acquitted solely on this ground, namely, that he was described as the Lord Pitsligo, and not by his true and proper title.

I assume then that we have two genuine and well-founded traditions, and a *bonâ fide* but erroneous attempt to link them together. We have, lastly, a fourth stage, namely, the Welsh story, told at p. 787. As to this, after reading what Lord Bramwell says at pp. 806, 807, no one, if I may say so with deference, can doubt that the story is untrue: I refer particularly to his Lordship's words about the thirty guineas paid to hire a boat. How then did the Welsh story arise? The following theory may afford an explanation.

The 'Alexander fereser' or 'Freser,' who certainly was in Wales (see pp. 786, 787), was the member of the Fraser family who, according to the second Lovat tradition, fled from Scotland to Wales, and was in a mine there (see p. 775).

Several members of the family of Fraser were called Alexander (see e. g. p. 778), and the presence of a man named Fraser or Freser in Wales in the middle of the eighteenth century would be very strange, and not easily explicable. The legitimate son of Simon Lord Lovat knew, as I submit, that this Alexander 'Freser' was in Wales, and had issue who might come and claim the estates, at the time when he made the declaration which I have called the second tradition (see p. 775); while the illegitimate son of Lord Lovat, when he said (see p. 784) that the man who went to Wales died without male issue, was thinking of the real Alexander of Beaufort, who did die without male issue, as Lord Blackburn shows at p. 792.

This Alexander of Wales then, if he was in fact a traceable member of the Fraser family, may well have said to his children on his death-bed, 'keep up the names, for a time may come' (see the Welsh tradition at p. 787 and what Lord Bramwell says on it at p. 805). He knew that the direct line of descent from Simon Lord Lovat was extinct, as all the sons of Lord Lovat's son, whom I have spoken of as the head of the family, died in his lifetime. He knew that 'heirs,' that is, claimants, would probably turn up on the death of his childless kinsman (see Lord Blackburn's remarks at pp. 776 and 796), and he may have believed that his own descendants, should a great 'Fraser case' be instituted, might claim the estates, eventually with success.

After Alexander of Wales had made this dying declaration, his son John Fraser (see p. 764) went to Scotland about 1815 to prosecute his claim. Such of his statements *post litem motam* as occur at p. 779, for instance his having the Lovat mark on his shoulder, though of course not legally admissible, have in them nothing improbable, and they may have been true. If his father were really a member of the Fraser family, it is quite possible that the son 'had the same mark as the other members of the family'—this characteristic mark recalls a weird feature of Scott's Redgauntlet—and the so-called Lady Lovat (see p. 781) may really have said that John Fraser was Lord Lovat; a statement which, if in fact made, is like the delusion of Lady Tichborne as to the notorious Orton being her son.

It was through this John Fraser (see p. 787) that the Welsh legend was handed down, after he had, in Lord Fitzgerald's words (p. 812), returned from Scotland, full of the story of his right to

the title and estates. To him are probably due the circumstantial details of the Welsh tradition, the improbability of which Lord Bramwell shows in a passage to which I have already referred. I would only add here that a man who took a fishing-boat from Inverness would sail to France (as Lord Blackburn says at p. 794), or perhaps to Norway, with which country a fisherman in the extreme north-east of Scotland might be acquainted; but that Alexander of Beaufort should find at Inverness fishermen who would sail with him round the north of Scotland and down the west coast to Wales, of which country they could hardly have heard, would be simply impossible, and a story of which such a voyage is an essential part is palpably untrue; Alexander 'fereser,' assuming him to have gone from Scotland to Wales, must have travelled by land.

To recapitulate: we start with two genuine and probable, but wholly independent, traditions in the Fraser family in Scotland. We then have an inference that both refer to the same man; and lastly, this inference is caught up by a professed claimant of the estates, and is by him—perhaps in all honesty—moulded into the form which the Welsh story finally took. Such, as I believe, was the origin and growth of the 'Lovat Myth.'

G. F. Hamilton.

REVIEWS AND NOTICES.

[**Short notices do not necessarily exclude fuller review hereafter.**]

Übersicht der Englischen Rechtspflege vom praktischen und kaufmännischen Standpunkte aus. Von ADOLPHUS SELIM, Rechtsanwalt bei dem hohen Gerichtshofe von England. Leipzig: Koehler. Wien: Manz. London: Siegle. 8vo. 329 pp.

THE preface to this book contains the following passage: 'Amongst all who will read it (viz. the book) we think there will be but few acquainted with our laws.' We think we can safely add that amongst all who *have* read it, there will be nobody whose knowledge of English law will have been improved. In fact the critical faculty of a foreign reader, however ignorant of English law, must be hopelessly obtuse, if he can accept this rude and undigested mass of absurdity and inconsistency as a fair representation of the law of a civilized nation.

The book deals with a variety of matters (English law in general; the history and constitution of the Courts; civil procedure; the law of contracts; carriers; agency; partnership and joint-stock companies; patents, trade-marks, and copyright; bills of exchange, &c., &c.) selected on no intelligible principle and arranged in the most unsystematic manner. There is hardly a sentence which is quite accurate, hardly a page which does not contain a gross blunder or an absurdity. The following extracts may prove that we have not been too severe[1].

About the Common Law we read on p. 2: 'True it is that this law did not originate with a legislator; but it is sanctioned by its application from immemorial times, that is, an application which can be traced back for a period of *about* 1159 *years*. . . . Our Courts often apply the Common Law. For instance, it determines that the eldest son inherits his father's real property, *if the latter die intestate*,' &c. After informing us that the English Common Law, 'like the laws of France, Austria, Germany, and Italy,' has its origin in Roman Law, the author continues (p. 3): 'Although the Roman Law is partly the basis of our Common Law, we must not overlook the fact that the Picts, the Danes, and other invaders modified it considerably by the barbarous character of their customs, which were gradually accepted by the Ancient Britons,' and proceeds: 'It was only by a great effort that this original system of law withstood the Roman conquest, and later on, during the frequent incursions of the Normans, it found small mercy at the hands of the foreign clergy,' &c. That clergy, Mr. Selim says, came over in great numbers (massenhaft) at the beginning of the reigns of the three first Norman kings, and 'to the fresh impulse given by this clergy to the study of Civil Law from the twelfth century onwards, through the foundation of law-schools in England, our Common Law nearly succumbed.' This ends the historical notice about the Common Law. We proceed to p. 4: 'The

[1] We have been anxious to be fair to the author in the translation, and have rather erred on the side of reducing the effect of his blunders than in the opposite direction; we have tried to reproduce Mr. Selim's style, which is peculiar, but here also we have been careful to avoid any exaggeration.

written laws consist of Statutes, Acts, and Edicts. . . . The oldest statute which we possess is the Great Charter, 1199 (*sic*), confirmed by Henry III in 1225. Undoubtedly there have been older statutes, but they cannot be found.' The distinction between public and private Acts is mentioned, but in a confused way, because another distinction, that between general and particular Acts (the latter term is translated 'specifisch,' specific), is mixed up with it. We are told that the distinction was introduced by Richard III, but the Act of 1850 (Lord Brougham's Act), which reduced its importance very considerably, is not mentioned. Again, we are informed that private Acts must be expressly relied on in the pleadings if they are to be noticed judicially, 'unless the pleadings contain the following statement, which is generally to be found in them, "That these specific laws are to be considered and applied as general laws, though the pleadings do not put them forward."' The passage about the application of the statute law to the various parts of the United Kingdom and to the British dependencies (p. 5) is also thoroughly misleading, but we proceed to Equity (p. 6). 'This form of legal practice (Rechtspflege) is above the Common Law, the rigidity of which it softens, and it must be defined as follows: a form of natural law, not contained in the Acts of our legislature nor in the rules of Common Law, which has been worked out with great care, and of which use is made in cases, in which the Common Law Courts give no effective remedy, *without in the best of cases causing heavy costs*, and with respect to occurrences, in the case of which Law in the strict sense of the word is not applicable. In other words this is a part of our legal practice, which although not embodied in any code or in any collection of statutes, is based on grounds of pure reason (reine Vernunftsgründe) and is applied according to certain principles. Equity makes everything legal (macht Alles gesetzlich) that contributes to remedy the imperfections and insufficiencies of Common Law, without however impairing its original foundation.' On p. 7 we read: 'The Chancery or Equity Courts owed their existence to the royal prerogative during the Anglo-Saxon period;' and further, 'The cases which came before this tribunal were: deeds of violence, damage, robberies, and several other misdemeanours, which were punishable (strafbar) according to Common Law, but the atonement (we suppose this is what Mr. Selim means by 'Gerechtwerdung,' a word of his own invention) of which could not be obtained by the plaintiff, in consequence of the protection which some mighty baron, or the sheriff (Landvogt), or the official (obrigkeitliche Person) before whom the case was brought afforded to his adversary.'

The following is a specimen of the historical information about the Courts (p. 10). 'The Court of Exchequer Chamber, introduced by Edward III as a court of equity, derived its name from the circumstance that the Lord Chief Baron, when sitting in Equity cases, took his seat in a place separated from the other Courts, which had the name of the Exchequer Chamber. This Court, deprived of its functions as an Equity Court in 1844, continued to exist until a few years ago as Court of Appeal for the three Common Law Courts,' &c.

The Aula regia has puzzled many historians and lawyers. Mr. Selim evidently thinks it was a building or part of a building, as he mentions on p. 13, that the Common Law and Equity Courts, before having taken their abode in Westminster Hall, 'assembled in the Aula regia or some other locality inhabited by the king.' On p. 14 we read: 'The high Court of Chancery had two kinds of jurisdiction, the ordinary jurisdiction (also called petty bag side), with regard to which the regulations of Common Law and

Statute Law were applied, and the extraordinary jurisdiction, with regard to which the rules and regulations of the Equity Law (des Equity Gesetzes) were paramount.' After having (on p. 18) mentioned the matters assigned at present to the Chancery Division, Mr. Selim proceeds: 'To the other divisions the following matters are usually assigned: all actions instituted for claims respecting real property and localities (Localitäten), from which somebody has been dispossessed or expelled; attempts against the person (violence or wounding), and the detention of another person's property (*sic*); erroneous (irrthümliche) imprisonment; slander or libel; actions by persons on whom personal damage (persönlicher Schaden) has been inflicted through any cause, which affects public or private interests; and *executions for a higher sum than that really owed, or for a sum not owed*, in so far as that sum only concerns rent.' On page 20 we learn that the Court of Appeal hears, *inter alia*, appeals from decisions of the Judicial Committee of the Privy Council; on page 23 we are told that the County Courts of our days 'have come to us from the Anglo-Saxons and Normans,' and that they were reorganised in 1846; the number of County Courts is given as 60 (for the benefit of foreign readers we may mention that the number of County Court districts exceeds 500, though the number of County Court *judges* is limited to 60, most of the judges having several districts allotted to them). We might at least expect Mr. Selim to know something about the functions of his own profession. This is what he says (p. 28): 'Finally we have the solicitor, who is the legal representative and adviser of his client in every action. It is he who takes the necessary steps, and *draws all contracts, civil as well as legal* (civile sowohl wie gesetzliche), and wills. It is but rarely that he addresses the Court himself, but he instructs the barrister who, according to the regulations of his professional body, never comes into contact with his client *except in the County Courts*.'

We will not weary our readers with any more quotations; the rest of the book fully equals the first twenty-eight pages, which we have by no means exhausted. We will only say one word about the translation of technical terms.

Mr. Selim in his preface pleads for indulgence with regard to any faults of expression on the ground of his not being a German. We are quite willing to make allowances in that respect, but when a writer is totally ignorant of the meaning of the words he uses, the only way to avoid mistakes is to avoid writing. If a performer on the piano excused his inefficiency on the ground of having learned to play the violin only, we should not be inclined to be merciful. Nothing can excuse a writer who translates 'hereditament' by 'Erbschaft' (inheritance) (p. 39), or who renders 'default or miscarriage' by 'Fehler (faults) oder schlechten Handlungen (bad actions)' (p. 39); who translates (p. 43) the word 'agent' by 'agent' (a peculiar kind of commission agent); 'carrier' (p. 47) by 'Spediteur' (forwarding agent); 'warranty' (p. 54) by 'garantie' (guaranty), &c., &c. What is, however, worse is that expressions given as English technical terms are frequently quite incorrect; for instance, contracts under seal are said to go by the name of 'specialities' (*sic*), the technical name for a simple contract is said to be 'agreement,' &c.

When we add that, as a general rule, no authorities are given for any of Mr. Selim's statements, and that no alphabetical index is supplied to a book intended to be used for purposes of reference, we shall have said enough.

ERNEST SCHUSTER.

Monomanie sans Délire: an examination of the 'irresistible criminal impulse theory.' By A. Wood Renton. Edinburgh: T. & T. Clark. 1886. La. 8vo. 76 pp.

'Monomanie sans délire is partial moral insanity, and moral insanity is a perversion of the affections, without any perceptible lesion of the intellectual faculties.' Medical specialists have devoted a good deal of attention to the subject of moral insanity, and some of them have made severe remarks on the unwillingness of lawyers to admit the existence of the disease. Mr. Renton has undertaken to justify the scepticism of the lawyers. He takes the evidence of the medical authorities, and he endeavours, not without success, to show that their definitions and illustrative cases will not stand the logical tests which lawyers are accustomed to apply. In each supposed case of homicidal mania, erotomania, &c. he detects the presence of some element inconsistent with the general description of moral insanity. He sets aside (1) cases in which there *is* a perceptible lesion of the intellect; (2) cases in which the criminal impulse is successfully resisted, *ergo* not irresistible; (3) cases in which the impulse has become irresistible simply because the criminal has habitually yielded to it. He finds no case which presents the combination necessary to satisfy the definition—'unlawful impulse, protracted resistance, perfect intellectual soundness, and involuntary gratification.' He concludes therefore that moral insanity, as defined by the doctors, does not exist. Without going so far as to say that Mr. Renton has succeeded in proving an absolute negative, I may safely compliment him on the acuteness and care with which he has handled his subject. The lawyer who has to match himself against a medical witness may derive much profit from the study of this pamphlet.

T. R.

A Treatise on the Law of Contributory Negligence. By Charles Fisk Beach, jun. New York: Baker Voorhis & Co. 1885. 8vo. xlviii and 512 pp.

The author of this work employs on occasion a somewhat 'high faluting' style. He tells us that the doctrine of *Davies* v. *Mann* is pernicious and pestiferous; that Lord Holt in his famous judgment in *Coggs* v. *Bernard* engrafted upon the stout stem of the English Common Law a much *bescholiazed* [*sic*] exotic from the Code of Justinian; that the result of three English cases[1] is that a child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years; and that the railway employé who, because he was engaged upon a train which was transporting munitions of war to the south in the days of secession, was subsequently held disentitled from recovering for an injury sustained in that employment, was no more legally or morally responsible for the sort of freight being transported than for the perturbations of Jove's satellites during the period of the civil war.

So far from adding anything to previous definitions of the subject he relinquishes as hopeless the attempt to give any precise definition of negligence which shall be of general application. Having stated the general rule of contributory negligence to be that such acts or omissions on the part of the plaintiff as cooperate with the defendant's negligence and are a proximate cause of the injury will defeat the plaintiff's claim, and

[1] *Waite* v. *N. E. Railway Co.*, E. B. & E. 719; *Davies* v. *Mann*, 10 M. & W. 546; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377.

having traced this to the case of *Butterfield* v. *Forrester* (11 East, 60), he proceeds to a severe criticism of its application and statement in the case of *Davies* v. *Mann* (10 M. and W. 546). This animosity appears strange (especially as subsequent cases which have enforced and confirmed the principle of that case[1] do not appear to be included in the same condemnation) until we find that there has been deduced from it, and as the author evidently thinks not without warrant, the objectionable doctrine of 'comparative negligence' which prevails in some of the States. The result however of his disregarding this class of cases is to diminish considerably the value of his discussion of the general rule. The whole doctrine of contributory negligence is based on the maxim *in jure non remota sed proxima causa spectatur*, and these important decisions according to English views are cardinal examples of its application to the subject. A just appreciation of them was therefore of the first importance.

The fact is that these cases present considerable difficulty. Where there is negligence on both sides and the circumstances out of which the accident ultimately arises form, as they so frequently do, a series of acts or events, they give rise to considerations favouring alternately one side and the other which might be compared to the steps in the old system of pleading with its rebutters and surrebutters. This may be illustrated by supposing for instance that in the case of *Radley* v. *L. & N. W. Ry. Co.* (1 App. Ca. 754), in addition to the actual facts of the case, it had been proved that a servant of the plaintiff's had been on the bridge before it was struck and perceived its imminent risk, yet had failed to give any warning to the defendant's servants, but that the latter had subsequently on first touching the bridge themselves perceived what they were doing, but through sheer stupidity, believing that the upper truck would be thrust harmlessly off, put on extra steam and so did the damage complained of. The reasoning by which the incidence of liability is finally established might be thus represented in dialogue between the parties:—

Plaintiffs. Our bridge has been broken by your servants' carelessness in driving against it.

Defendants. Say rather by your own; for it was your men who left the one truck on the top of the other so that they could not pass through.

P. What of that? Your men saw it there and might have removed it.

D. They were not more to blame than your servant who came on the bridge while the train was moving, yet gave no warning!

P. That would not have prevented what happened, for your driver admits that he saw exactly what he was doing, but, trusting to the upper truck being thrust off, was stupid enough to go on.

The result is that the party *who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent*, is considered solely responsible for it; and this will be found, we believe, to be true of all such cases, whether the series be long or short.

After an examination of the general rule the author proceeds to deal with certain special considerations affecting (i) the plaintiff's right to recover, (ii) the defendant's liability. These are a sort of *media axiomata* in the region where considerations of fact often recurring tend to harden into set rules, the discussion of which is useful as giving definiteness to the general principle. Such are the propositions that where the plaintiff is put by the defendant's negligence in a situation where he must adopt a perilous

[1] *Tuff* v. *Warman*, 2 C. B. N. S. 757; 5 C. B. N. S. 573; *Radley* v. *L. & N. W. Railway Co.*, 1 App. Ca. 754.

alternative and in haste acts erroneously, his act will not be measured by what would be the standard of ordinary care under ordinary circumstances; and again, that when the defendant throws the plaintiff off his guard he may be liable, notwithstanding that the plaintiff's acts would be negligent if measured by an ordinary standard. Some of these rules, as worked out in America, diverge curiously from English doctrine; thus in several States it is held that where a man incurs great risk to save human life his act is, as matter of law, not negligent, though this proposition is again subject to some not very clear limitation in case the act is utterly rash.

The author next discusses the doctrine of 'comparative negligence' which obtains in Illinois and four other States, and criticises it effectively as departing from the principle of causation which underlies the subject. This is the doctrine by which the plaintiff is held entitled to recover from the defendant whenever his negligence through contributing to the injury is only *slight*, while that of the defendant is *gross*, their negligence thus differing by a whole *degree*.

The next chapter deals with the difficult subject of the 'imputed contributory negligence of third parties.' The general though not universal rule in America is that in order that the negligence of a third person should be imputable to the plaintiff, it must be shown either (i) that such third person was the plaintiff's agent, or (ii) that the cause of action itself is derived from the third person. It is not necessary to point out how the first branch of the rule, which alone needs comment, conflicts with the doctrine of 'identification' obtaining in this country, or how forcible are the criticisms to which the latter has been subjected by both judges and text-writers in this country. In this chapter is also considered the case of claims by persons *non sui juris* especially children. In most of the States the rule prevails (founded on *Hartfield* v. *Roper*, 21 Wend. 615) that the negligence of the guardian or parent is imputable to the infant, although it is regarded as a harsh rule, and the Courts incline to restrict it where possible. The decisions in America on this matter seem as unsatisfactory as our own. There seems to be a lack of the important distinction between (i) cases where the guardian and the defendant have both contributed proximately to the accident, where it would seem reasonable that both should be liable to the infant, and (ii) cases where the accident could have been avoided by one of them (i. e. the guardian or the defendant) notwithstanding the negligence of the other, in which cases it would seem right that the one thus proximately causing the injury should alone be liable. (Cf. *Clark* v. *Chambers*, 3 Q. B. D. 327, and *Hughes* v. *Macfie*, 2 H. & C. 744.)

The remainder of the book consists of chapters on special classes of cases, viz. those connected with Railway Companies, other Highways, Master and Servant, and certain other special cases, and two devoted to a discussion of the Burden of Proof, and the distinction between Law and Fact.

On the whole this book cannot be considered to contribute much to the general theory of the subject. It is, however, a useful collection, carefully prepared and well arranged, from the great store-house of American cases, illustrating the subject with an immense number of decisions, which throw valuable light alike on questions of fact and on the presumptions which are gradually growing out of them.

Legal Maxims in Urdu. By LALA BAIJ NATH. Agra: Bahar Hind Press. 1886. Large 8vo. 705 pp.

WE feel certain that the labour of Mr. Byjnath in publishing the book before us will be duly appreciated by his countrymen. Practically the work is an Urdu version of Dr. Broom's Collection of Legal Maxims. An attempt has also been made to enunciate and explain many rules of law and equity that are of daily application in our Courts, but in this attempt we cannot say that the editor has acquitted himself very favourably. A maxim of law always embodies a principle, but a rule of law may not; and in his selection and exposition of such of the rules of law as are collected in the book the editor has not paid sufficient regard to this distinction. For instance, the rule in *Pigot's* case has been discussed in one place in such a manner as to indicate that the writer is not quite acquainted with the resolutions arrived at in the case or the extent to which recent decisions have modified them. We venture to think that if he had confined himself throughout to a translation of Dr. Broom's well known-work, with additional illustrations of the maxims from cases decided by the Indian High Courts, the practical utility of his work would have been greater. Again we cannot understand how such a rule of equity as *Aequitas sequitur legem* concerns the Indian Courts, where the distinction between legal and equitable estates does not exist. Very likely our author has included this rule among general maxims of law, because Story treated it (with other cognate rules) as a maxim of equity. But Story used the word maxim to signify any cardinal rules, and did not confine it to principles of universal application. Properly, however, a rule of law is a definite proposition from which definite legal consequences can be deduced. A maxim is an indefinite and symbolic proposition, which groups together rules or classes of rules, and will not bear to be treated as a logical premiss. The treatment of maxims like rules is a besetting snare of clever laymen and inexperienced lawyers. It is true that similar confusions occur in abundance in Dr. Broom's own work, which fairly represents the defects as well as the merits of an English legal mind formed by the usual unscientific process, and endeavouring too late to be scientific by the light of nature; and therefore we cannot blame the Urdu paraphrast for being no wiser than his original. Neither can we blame him for not having found a better original, for with all the shortcomings of Broom's Legal Maxims we do not know of any English book more fitted on the whole to serve his purpose. Still it would be fatal at this day to accept Dr. Broom as a philosophic lawyer. Philosophy is best. Rule of thumb is well enough up to a certain point. But philosophizing by rule of thumb is tolerable neither to gods nor men. One feature of the book wherein the writer has shown some originality is the citation of passages from the so-called Code of Manu and works of several doctors of Mahommedan law in illustration of the principal maxims. These quotations from the classical texts of Hindu and Mahommedan jurisprudence will do more to impress on the minds of our Indian fellow-subjects the lessons to be derived from the maxims than any exposition of them by ever so learned an English Judge from the Bench. Again, in our author's treatment of such maxims as *Qui facit per alium facit per se, Respondeat superior, Res judicata pro veritate accipitur*, we have been somewhat disappointed. They are of every-day application and deserve to be more elaborately and carefully expounded. In recommending the work to Indian students we must warn them against confounding maxims with rules of law; but we have no hesitation in saying that those who are unable to use English text-books,

and to whom Urdu is native or familiar, will find in Mr. Byjnath's work a mass of learning and information on many points of practical importance to suitors and practitioners; though the want of an index may give them trouble in finding it. That want is a grave fault in any book intended for any kind of serious use, and in a law-book hardly ever pardonable, and it will much impair the value of this book for working use and reference. Legal human nature is much alike everywhere, and we apprehend that a large book without an index is as much an abomination to pleaders in the Mofussil as to counsel in the Royal Courts of Justice. We have noted some lesser marks of haste or want of due forethought, but it is not worth while to specify them.

Davidson's Precedents and Forms in Conveyancing. Fifth Edition. By Thomas Cooke Wright and John Khelat Darley. Vol. I. London: W. Maxwell & Son. 1885. xxviii and 679 pp.

We have looked with considerable interest, since the passing of the late Real Property Statutes, for the appearance of a new edition of Davidson's Precedents; and confess to a slight feeling of disappointment with the first instalment. But a little consideration will make it doubtful whether such a feeling is really justifiable. The building up of the old precedents was a work of time; they were in fact constantly being improved. A suggestion here, a decision there, and an occasional Act of Parliament, drawn by somebody who understood what he was talking about, all helped in their turns to produce a system under which drafts could be drawn by men who knew what interpretation the Judges would put upon the completed deeds, and who were thus enabled to give tolerably precise effect to the intentions of their clients. In those days there was no chance of a Judge talking of the power of sale in a mortgage deed as the 'defeazance' thereof (still less, of his being reported); nor had conveyancers to provide for the possibility of the rule in *Shelley's* case being mistaken for a rule of construction, or to anticipate any other accidents of that kind. But we have reformed our Courts as well as our conveyancing, and our conveyancers have to adapt their drafts to meet an altered state of circumstances. Now, the general effect of the recent statutes is well known, at least to practitioners, and is sufficiently represented for the purpose of all ordinary cases by the last edition of the 'Concise Precedents'; but when we came to the 'large Davidson' we not unnaturally expected to find greater delicacy, and certainly hoped to find in the volume before us the same characteristics which placed former editions at the head of all books of their class. But whether the learned editors 'despaired of the republic,' or whether the time which has elapsed since the passing of the late Acts has been insufficient for the elucidation of their wonders, the fact remains that even in this, the 'Common Form' volume, we think is there room for improvement in delicate points.

For instance, the form of the power to appoint new trustees (p. 340) takes no notice of the fact that sect. 31 of the Conveyancing Act, 1881, allows a trustee to retire against the will of a tenant for life to whom the power to appoint new trustees is expressly given. If such tenant for life 'is unwilling' to appoint a new trustee, the trustee who wishes to retire can himself do so. We cannot possibly believe that this would be desired by settlors in general; and if so the 'Common Form' ought to provide against it. Again, the acknowledgment of the right to production of deeds (p. 281) ought certainly to be accompanied by an express acknowledgment that the deeds are retained by the person giving the acknowledgment, so as

to avoid the necessity for proving such retention; at all events until it shall have been decided that no such proof need be given beyond the acknowledgment. On p. 170 there is a more serious blot: *Bellamy's* case is cited for the proposition that sect. 56 (as to an endorsed receipt being a sufficient authority to receive the consideration) does not apply where the consideration is to be paid or given to trustees. It is clear that the section would apply if it were within the scope of the trustees' powers to give an authority to their solicitor to receive the consideration.

A very curious point is raised as to the statutory covenant against incumbrances (p. 280). We find there a note stating that 'where, as in the case of a jointress, the incumbrancer is not a mortgagee, it will be necessary to insert an express covenant against incumbrances.' Why? The Act says, 'where a person conveys and is expressed to convey as . . . . mortgagee, &c.' A jointress can be *expressed to convey* as mortgagee. No doubt, not being in fact a mortgagee, she does not in fact convey as mortgagee; but she is *expressed to* do so. Is that not enough? We do not presume to say that it is; but if, as the editor thinks, it is not, the consequences are rather more far-reaching. In most of these statutory covenants, the statute uses the words 'conveys and is expressed to convey:' if it is necessary that the person should actually convey as (say) beneficial owner, besides being expressed so to do, the 'beneficial-owner' covenants will not arise in a case where the party has previously, from fraud or forgetfulness, granted away his whole estate, and has consequently nothing actually to convey; in fact, the statutory covenant will not arise in the very case where it is most wanted! We fear that people have yet to realise what 'simplification' has been introduced into our conveyancing.

A Selection of Leading Cases in the Common Law. With Notes. By Walter Shirley Shirley, M.P. Third Edition. London: Stevens & Sons. 1886. 8vo. xvi and 494 pp.

This is the third edition of a work which, though open to a good deal of exception on the score of taste and literary form, seems to have been materially improved since its first appearance, and is capable of being really useful if discreetly used. But Mr. Shirley has yet to learn, or has forgotten, various matters which it is good to know, such as that false imprisonment is not the same thing as malicious prosecution (see his remarks on *Perryman* v. *Lister*); that *Lumley* v. *Gye* does not merely explode a fallacy as to remoteness of damage, but (as explained by *Bowen* v. *Hall*) deals with a large and fundamental question of the existence of a duty; that the authority finally confirmed by the House of Lords in *Beer* v. *Foakes* was that, not of *Cumber* v. *Wane*, but of the much older opinion reported by Coke in *Pinnel's* case; that *Hoare* v. *Rennie* is not to be dismissed off hand in a footnote as an overruled case (see at p. 281 of this our current volume, in the April number); and that, on the other hand, the doctrine of 'representations' acted on by Stuart, V. C. in *Loffus* v. *Maw* is not only of doubtful authority, but is clearly overruled by the House of Lords in *Maddison* v. *Alderson*.

As the book in its present state aims at being more than an examination manual, it is proper to notice that the absence of a general table of cases is a grave defect, that there is much want of uniformity in the citation of authorities, no one set of reports being constantly referred to, and that, what is more, the recognized abbreviations are in divers places miscopied

or misprinted so as to make the reference unintelligible. We do not much like the frequent citation of cases which (on the face of the references) are not to be found either in the authorized Reports or in the Law Journal, but on this point there is unfortunately no settled usage.

Recueil des Traités de la France. Par M. DE CLERCQ. Paris: Pedone-Lauriel. Tome XIV, 2ième partie. 1886.

THIS volume is devoted to 1884-1885, and completes the part published in 1884, which embraced the period 1883-1884.

A valuable portion of the contents of these volumes is the incorporation with the treaties of the introductory parliamentary reports, giving the history and course of formation of the different treaties. Some of these reports, such as that of M. Engelhardt's on the Congo Conference held at Berlin in March, 1885, are valuable documents for both historian and diplomatist.

La Condition Juridique de la Femme dans l'Ancienne Égypte. Par G. PATURET. Paris: Ernest Leroux. 1886. liv and 77 pp.

M. REVILLOUT, the able professor of the École du Louvre, whose researches in Egyptian jurisprudence are adding precious material to our knowledge of ancient law, has found a fellow-worker in his pupil, the author of this little work. M. Revillout in a long prefatory letter remarks that the legal contracts, deeds, and other documents of early Egypt and Chaldea which have been unearthed are now to be counted by tens of thousands, and that juridical training is requisite for their comprehension. M. Paturet realises his professor's recommendation. He has had the advantage of a preliminary and comparative study of French and Roman law, and is able to set forth what is striking in the position of woman in ancient Egypt. Woman there was the equal of man, and remained so for two centuries after the Roman conquest. No perpetual tutor or prohibitions like those of the Velleian senatus-consultum restricted her independence. Egypt in this respect is an exception to all the peoples of antiquity in the East as in the West, who treated woman as legally inferior to man. In Egypt, says M. Paturet, woman was the equal of man, the daughter the equal of the son, the sister the equal of the brother. She needed no protection *propter imbecillitatem sexus.*

Le Morcellement. Par ALFRED DE FOVILLE. Paris: Guillaumin. 1885. 283 pp.

M. DE FOVILLE has an ability for making statistics interesting which is at least unusual. In the volume before us history, philosophy, poetry, and figures are mingled in pleasant alternation, so that this book on the dry subject of subdivision of the land in France has a cheerful look, tempting even to the dullest arithmeticians.

The author is well pleased with the effects of subdivision in France, and he holds up to those Frenchmen who are not so 'the unjustifiable anomaly that 2000 proprietors still at the end of the nineteenth century hold half the territory of Great Britain, while the large towns are teeming with an ever-increasing multitude of beings in a state of abject physical and moral misery.' M. de Foville is opposed to any change in the Civil Code for granting the testamentary freedom now withheld, though he admits that

equality in treatment of the children belongs to the character of the French people, and is not the outcome of legislative enactments (p. 195).

Traité de Droit International Public, Européen et Américain. Par P. Pradier-Fodéré. Paris: Pedone-Lauriel. 1885. 8vo. Tomes 1er et 2.

'There is,' says M. Pradier-Fodéré, 'an ideal of international law which exists as an innate notion (*notion innée*), an aspiration. Philosophers conceive its principles, maxims, and rules with their generalising spirit, and the principles of this law are but the principles of universal justice and moral order which govern the existence of collective and individual beings. The ideal soars (*plane*) above political societies, and its reality is proved by the fact that at all periods it has been appealed to as a law or as a pretext by the powerful states when in their interest, and by the weak and oppressed states as a supreme resort, a cry of anguish against their oppressors. Beneath this typical law, this ideal, are the conventional rules which are recognised by the unequivocal and constant usage of regulated nations (*nations policées*) and their governments, or which are deduced from the institutions, degree of civilisation, and manners and customs of these nations, or which are expressly laid down in public treaties.' (T. i. p. 48.)

The principles of this typical law and of the conventional rules admitted in the practice of nations are the subject of the law of nations, or, as this branch of the law is now usually called on the Continent, public international law. The distinction drawn by M. Pradier-Fodéré between ideal and positive law is but the division of Grotius. No classification has been devised which can claim originality and be called an improvement.

In a long introduction, extending over upwards of 280 pages, M. Pradier-Fodéré endeavours to determine the precise character of nations as international persons and states. The words 'nation,' 'people,' and 'state' are in common parlance employed as synonymous. 'On entend par *nationalité*,' says M. Pradier-Fodéré, 'le fait et le droit d'exister à l'état de nation.' Before the present century the word was used in the sense of belonging to a State. M. Pradier-Fodéré credits Madame de Staël with first having employed the word in the new and ethnographic sense, which has given rise to the Pan-Slavism, Pan-Germanism, and Pan-Hellenism of our own day.

M. Pradier-Fodéré is no friend of this new idea of nationality as a basis for the redistribution of States. He quotes a famous speech of M. Thiers on this subject, which is worth remembering, though he was a special pleader. To realise the idea with French logical completeness is no doubt a practical impossibility, and to do so as a principle of revision we should require, as M. Thiers said, to destroy Switzerland. We could not give the Austrian Germans to Germany without giving several millions of Slavs along with them; if these Slavs were given to Russia, some millions of Germans would have to go along with the Slavs. In the end, said M. Thiers, we should have what occurred in the Elbe provinces, viz. to rescue the Germans who were under the yoke of the Danes, three hundred thousand Danes were placed under the yoke of the Germans. M. Pradier-Fodéré disposes of the idea as a 'false and dangerous' one, either born of the brains of ideologues or devised to justify spoliation.

In the first volume M. Pradier-Fodéré farther discusses the rights and duties of States, their right of self-preservation and their right of inde-

pendence. In the second volume he follows up the rights of States with the right of equality, the right of property, and accidental rights and treaties.

It would have been interesting to see M. Pradier-Fodéré dwell upon Chapter VI of the General Act of the Berlin Congress of 1885, on the essential conditions to be fulfilled in taking possession of territory on the African coast. M. Pradier-Fodéré merely quotes the articles of the treaty in a note without expressing an opinion.

The work is full of information, and every line of it shows the extensive reading of its author.

Mr. Serjeant Stephen's New Commentaries on the Laws of England (partly founded on Blackstone). By His Honour JUDGE STEPHEN. Tenth Edition. London: Butterworths. 1886.

THE title-page of the tenth edition of Stephen's Commentaries is inscribed 'Mr. Serjeant Stephen's New Commentaries on the Laws of England (partly founded on Blackstone). By His Honour Judge Stephen. Tenth edition.' But we gather from the preface that Judge Stephen has not reverted to the editorship of his father's Commentaries, for the present issue appears to be the work of Mr. Archibald Brown. At any rate this gentleman cannot be charged with a want of reverence for the task entrusted to him, for he goes so far as to describe the Commentaries as 'a book of authority in the Courts.' No doubt it is a book useful for reference to persons who are entirely ignorant of some particular part of the law and want to get some notion of what to look for and where to look for it; but he would be a bold man who cited any part of it—even a part in square brackets—as an authority upon which judges might be expected to rely.

The restless activity with which the Legislature, in the intervals of political strife, seems to consider itself bound to pour out fresh statutes largely modifying the existing law has done much to increase the burden of Mr. Brown's labours. Altogether he has found it necessary to refer to 175 new statutes which were not passed soon enough to be included in the preceding edition, and it is obvious that such events as the publication of the Rules of 1883, and the passing of the Bankruptcy Act of the same year, must have given him a great deal of occupation.

The first of the practically new chapters is that which gives the effect of the Conveyancing and Settled Land Acts of 1881–84. It consists for the most part of something between a literary account and a digest of the contents of the two principal Acts, a good deal of it being in the words used by the Legislature. This method ensures accuracy, but in a book intended mainly for students it might have been well to indulge more in explanation and comment. The references to cases decided upon these Acts since they were passed are rather scanty.

In the Second Part of the Second Book—the part dealing with personal property—the chapter which treats of 'Title by Invention' has been considerably expanded. This is an almost necessary consequence of the passing of the Trade-marks, Patents, and Designs Act, and suitably supplements the disquisition on Copyright to which it is appended. Chapter VI of the same Part, which deals with Bankruptcy, has also, of course, had to be remodelled, and this part of the work has been done with care and skill which reflect great credit on Mr. Brown.

The chapters describing 'Public Rights' have been affected by the pass-

ing of the Franchise and Redistribution Acts of 1884–5, and the Subsidiary Acts which parliamentary reform involved. The last Corrupt Practices Act has also required notice in this connection, as well as embodiment in the part of the Commentaries which deals with Criminal Law. Under the head of 'Civil Injuries,' and the remedies they involve, are included the whole subject of the Practice of the Courts. The Acts amending the principal Judicature Acts, and the system of which the Rules of 1883 are the centre, have kept this part of the work in a state of continuous development for the last twelve years. It would be departing entirely from Blackstone's original plan to give anything more than a general sketch of the multifarious matters with which these Acts and Rules are concerned, but so much new matter, as it has been thought necessary to add, appears to have been grafted on the old with considerable success.

In the Sixth Book, which treats of Criminal Law, the alterations have been neither extensive nor important. It may be observed that the exceptions to the ordinary rule that prisoners and their wives cannot give evidence are much more numerous than are indicated here (Vol. IV, p. 442). No account is taken of the provisions to this effect either in the Corrupt Practices Act, 1883, or in the Explosives Act, 1883. These statutory exceptions are now very numerous, and most of them are founded on no particular principle.

It was suggested in the last number of the Law Quarterly Review that the desirability of perpetually re-editing a good book of this kind was at least doubtful. When Serjeant Stephen first published the Commentaries he thought it desirable to indicate by the use of square brackets the parts of his work which were 'taken substantially' from Blackstone. Ten editions, by various hands, have now been issued, and there is no possibility of discerning, save by an elaborate investigation of dates, which is Serjeant Stephen, which Judge Stephen, or which Mr. Archibald Brown. Doubtless, however, as long as it continues to be the best single work for the use of students at large, it will continue to be re-edited as occasion demands, and if it continues to be as well done as it has been by Mr. Brown, it probably has before it a long and useful career.

Intermediate Law Examination made Easy. A Complete Guide to Self-preparation in the Tenth Edition of Mr. Serjeant Stephen's New Commentaries on the Laws of England (excluding Books IV and VI). Sixth Edition. By Albert Gibson, Solicitor. London: Law Notes Publishing Offices. 1886.

One of the objections to the existing practice of continuing to re-edit the same books is, that it gives rise to endeavours to boil them down for the base purposes of examination. Sometimes they are cut up into question and answer, and sometimes they are translated into baldly stated 'points,' as in the case in Mr. Gibson's Guide to Stephen's Commentaries. Opening it at random we read—

'Chapter III. Of Parent and Child.

'Remarks.

'This is by no means so important a chapter for examination purposes as the one just finished, but at the same time you must read it very carefully, as there are several nice points in it on which the Examiners might ask questions.'

A little further on, under the heading 'Points to note,' come eighteen 'points' put in the briefest possible terms, such as, '13. Who a bastard is, and what disadvantages he labours under, and by what means he can be made legitimate.' The last clause will show the value of this sort of book in respect of accuracy. These parasitical essays are degrading to a noble study. A man who cannot pass examinations without the help of this kind of short cut, and can with it (if there are any such), will never be at all a better man or a better lawyer for having read the principal work alongside with the parasite.

The County Court Statutes from 1846 *to* 1882, *with the Rules, Court Fees, and Costs,* 1886. By G. Mauley Wetherfield and Fred. Wetherfield, Solicitors. Second Edition, revised and enlarged. London: William Clowes & Sons. 1886.

Costs in the County Courts, Exclusive of Admiralty and Bankruptcy. By Charles Cautherley, Registrar of the Leeds County Court and District Registry. London: William Clowes & Sons. 1886.

Messrs. Wetherfield have published a second edition of their book on the County Court Acts and Rules. It contains the rules which came into force in the spring of the present year. It does not pretend to be a text-book of the County Court practice, or anything more than its name implies, viz. a collection of the existing statutes, parts of statutes, and rules which the County Courts administer. It also gives some forms of summonses, affidavits, and the scales of costs and fees authorized under the existing rules. The introduction briefly sketches the jurisdiction of the Court under the various statutes creating it, and is well done as far as it goes. As a compendious collection of the authorities likely to be required for the immediate decision of a point of practice, this little book, which is well printed and bound, leaves little to be desired.

Mr. Cautherley's work, which is a good deal smaller, is much the same thing with regard to costs. Whether it is worth while to put County Court costs in a volume by themselves is a question which only experience can decide. Granted that the work was to be done, Mr. Cautherley has done it well.

A Treatise on the Construction or Interpretation of Commercial and Trade Contracts. By Dwight Arven Jones, of the New York Bar. New York: Baker Vooris & Co. 1886. Royal 8vo. 596 pp.

The design of this treatise is to extract from the American and English cases the principles which govern the interpretation of mercantile contracts. The object is carried out with great industry. The author's conclusions are in the main sound; but his discourse has a verbosity, marring a work which claims to contain a clear statement of principles.

Perhaps the most valuable portion of the book is that which treats (pp. 69–265) of the use of parol evidence in relation to written contracts; but this subject is encumbered and obscured at the outset by a discussion of Lord Bacon's celebrated distinction between patent and latent ambiguities. In the course of some ten pages the author shows that these terms bring no aid to his inquiry—namely, as to the intention of parties to a contract. This might have been assumed as obvious. Lord Bacon's terms relate to the in-

tention recorded in a *deed*, or other instrument which the law invests with a character of special authority; and he says that '*ambiguitas patens* is never holpen by averment, the reason being that the law will not couple and mingle matter of specialty which is of the higher account with matter of averment which is of the lower account in law.' Clearly this language is inapplicable to 'written contracts,' where the conclusive nature of the document (so far as it is conclusive) arises, not from any special authority given by law to the instrument, but from the circumstance that the parties have adopted the writing as the medium for the expression of their common intention. The author would do well to study and assimilate the brief and pointed observations on this subject in the fourth chapter of Blackburn on Sale (pp. 43–45 of the original edition).

The work will be found valuable as a collection of authorities on the subject treated. The American authorities appear fully dealt with; but there are omissions of some English authorities we should have expected to see cited. For instance, in regard to the effect of the statements of the assured when made the basis of a contract of life-assurance, we should have expected a reference to the case of *London Assurance Co.* v. *Mansell*, 11 Ch. D. 363. Upon the subject of an ambiguous promise being construed in favour of the promisee, we should have expected, on the analogous point of the liability of an agent who acts upon ambiguous instructions, a reference to *Ireland* v. *Livingstone*, L. R., 3 H. L. 395. And, upon the nature of the authority to fill up blanks in negociable paper, to *Carter* v. *White* (as to the authority to fill up a blank acceptance continuing after the death of the acceptor), 25 Ch. D. 666.

The index is faulty in principle. 'Language' is not a heading under which any one is likely to look for anything. Yet it occupies a page and a half; 'Law governing construction' occupies over a page; '*Rules* of construction,' '*Rules* for construing ambiguous contracts,' together, nearly three pages. And we look in vain for headings, such as 'St. Lawrence,' 'Unknown contents,' which would at once guide the practitioner to certain well-known cases.

There is nevertheless stuff in the work deserving to live to another edition; and it may be hoped that a careful revision may eliminate faults with which the considerable merits of the book are at present encumbered.

Lectures on Agricultural Law (Scotland). By Robert Hislop, B.L. Edin., Solicitor, Auchterarder. Glasgow: William Hodge & Co. 1886. 8vo. 155 pp.

In four lectures, delivered to members of the Strathearn Central Agricultural Society, the author deals with the law in Scotland relating to the rights conferred upon occupiers of land by the two recent Acts—the Ground Game Act, 1880; and the Agricultural Holdings (Scotland) Act, 1883. The subject is treated with perspicuity, and made interesting to laymen as well as to lawyers.

With becoming gravity the author discusses the question which has much agitated the Scotch Courts, arising out of the prohibition (sec. 6 of the former Act) against employing spring-traps 'except in rabbit-holes.' It appears that the question, 'What is a rabbit-hole?' has elicited much evidence of experts assisted by the experience of a high authority upon the Bench; and as the *domicile* of the rabbit seems involved, the subject is perhaps not exhausted.

The author's statement, in his third lecture, of the principles and practice, before the Act of 1883, relating to tillage and way-going crops, is perhaps the best part of the book, and forms an appropriate introduction to the brief *résumé*, contained in the fourth lecture, of the provisions of the last-mentioned Act.

A Treatise on the Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals; being a second edition of Williams and Bruce's Admiralty Practice. By GAINSFORD BRUCE, Q.C., and C. F. JEMMETT. London: W. Maxwell & Son. 1886. 8vo. xxxviii and 876 pp.

Two hundred and thirty-five pages only of this work are concerned with the jurisdiction of the Probate, Divorce, and Admiralty Division in admiralty matters, or, in a shorter phrase, with admiralty law as distinguished from admiralty practice. It is therefore as a book of practice that we have chiefly to notice this work, which is not only a second but a much enlarged edition of Messrs. Williams and Bruce's work. Unquestionably the Judicature Rules have rendered the editors' task not only more difficult but to a certain extent less acceptable to the profession. Because the practice in admiralty actions, except in regard to a certain number of special points, such as bail, arrest of ships and so forth, is the same as in cases in the other Divisions. Consequently the editors have had to face the fact that they have to deal with nearly all the Judicature Rules, and so have had to incorporate in a work on a special subject an immense mass of material which practitioners have at hand in the ordinary works on the Judicature Acts. A great quantity of the text of this book is therefore taken up by statements of the substance of these rules and by notes with references to these rules. For example, about twenty pages are devoted to the chapter on 'Pleadings,' which is simply a *résumé* of the Judicature Rules on this subject. It is much more satisfactory to the practitioner to consult the rules themselves. As though recognising this unsatisfactory way of treatment, nearly twenty pages of the Appendix are taken up by a reprint of a certain number of the rules more immediately concerning admiralty practice.

But yet there can be no question that this book contains a mine of information on the subjects of which it treats, though it is rather too much like a mine; for the practitioner has to dig about for the information he needs in a good deal of irrelevant matter, and in notes which are so copious throughout, that in some cases they fill up nearly the whole of the page. This very full notation shows great industry but a want of grasp of the subject-matter of the work. It is somewhat strange that with this tendency in the editors to put in overmuch matter, the very important Admiralty Court Acts of 1840 and 1861, which are largely the basis of the later jurisdiction of the Court, are not placed in the Appendix; for without these statutes no such work as this is complete. There are numerous places in the text and appendix where a judicious pruning of the material would have given space for these important Acts. On the whole, though this book will be useful to practitioners from time to time, it is undoubtedly inferior as a legal work to the more concise first edition.

NOTES.

CORRESPONDENTS who offer contributions to this REVIEW would save trouble both to themselves and to the Editor if they would in the first instance communicate with the Editor by letter, stating the subject of the proposed contribution, the length at which and the manner in which it would be treated, and their special qualifications for dealing with it. For want of these precautions not only disappointment may be incurred, but work of real merit may be wasted for divers extraneous but invincible causes, as where the subject has already been taken in hand by another contributor, or for some reason is not opportune. The contents of each number of the REVIEW are settled, as a rule, about a month before the date of publication. In a page of our larger type there are about 475 words, and twenty-five pages may be taken as the greatest admissible length for a single article. It ought to be needless, but we fear it is not, to add that MS. intended for the press must be written on only one side of the paper, and that particular attention should be given to the legibility of figures, references, and abbreviations of all kinds, proper names, foreign or unusual words, and quotations in foreign languages. Printers are human, and have much to bear. Writers would be more careful in these seeming trifles if they knew how much is saved in the end by a little forethought at the beginning.

EXECUTIONS AS A RISK TO PURCHASERS OF LAND.—The complacency with which some people regard the existing system of land transfer has been rudely ruffled by the decision in *Re Pope*, 34 W. R. 645, 693. It was generally believed by those well versed in the practice of the law of real property that a purchaser, who caused his vendor's title to be properly investigated, was, in the absence of actual fraud (a matter that no laws can guard against), practically safe as against the rights of third parties: *Re Pope* shows that this opinion is erroneous. In that case an unlucky purchaser completed his purchase in ignorance that the land had been delivered in execution to a judgment creditor of the vendor, and it was held that the rights of the execution creditor prevailed over those of the purchaser. I purpose to explain shortly the nature and extent of the danger to a purchaser produced by executions against the vendor.

There are two principal methods by which a judgment creditor can enforce his judgment against the land of his debtor:—

(1) By having the land delivered to him in execution; when this is done he can apply the rents and profits, or cause them to be applied, towards satisfaction of his debt; or

(2) He can, after the land has been actually delivered in execution, register his execution under 27 & 28 Vict. c. 112, and then apply to the Court for sale of the debtor's land.

It will be observed that where the debt is but small compared to the income of the land which is seized, the creditor may not wish to proceed to a sale; in this case there is no occasion for him to register the writ; and there is, as I shall proceed to show, no means by which an intending purchaser can ascertain that the vendor's land has been delivered in execution.

The judgment creditor can obtain delivery in execution of his debtor's land, (1) by issuing an elegit, (2) by obtaining the appointment of a receiver.

The proceedings under an elegit are the following: the creditor sues out the writ and delivers it to the sheriff, who impanels a jury to enquire what lands the debtor has in his bailiwick; he then makes his return to the writ, this is a formal statement of what he has done in obedience to the writ, it is engrossed on parchment and signed by the under-sheriff; the writ, the return to the writ, and the inquisition, are then returned by the sheriff to the Court, this proceeding is called the return of the writ.

The return to the writ, which takes effect on the signature of the under-sheriff being affixed to it, operates as delivery in execution to, or seizure by, the creditor of all the debtor's land comprised in the inquisition; it confers on the creditor a mere right of entry, a right which he can enforce against the lands of which the debtor is in possession by ejectment, or the form of action now substituted for it, and against the lands in the possession of his tenants by any of the means by which a landlord can recover rent. The result is that a purchaser who completes after the return to the writ is made is too late, the debtor's estate has passed away from him, and the purchaser loses his money.

The whole of the proceedings under an elegit may be made without any notice to the debtor; although the Sheriff's Court is open to the public, the proceedings in taking the inquisition are of a merely formal character, and are attended by no real publicity, add to which that the sheriff is not bound to keep any register of writs of elegit. The result is that a purchaser has no means of ascertaining whether the land has been delivered under an elegit except by making enquiries of the under-sheriff, enquiries that the latter is not bound to answer, though it is probable that as a matter of courtesy he will be willing to do so on being paid for his trouble.

Since the passing of the Judicature Act, 1873, the appointment of a receiver has largely been employed for the purpose of enforcing judgments. It is unnecessary to discuss in this place when it ought to be used instead of an elegit. The appointment of a receiver as a final process operates as actual delivery in execution of the land to the purchaser. There appears to be no manner by which a purchaser can ascertain whether a receiver has been appointed, so that the result may be, as in *Re Pope*, that he may complete in ignorance of the appointment having been made, and may thus lose his purchase money.

The judgment creditor can enforce his judgment against the leaseholds of the debtor by a writ of *fi. fa.*, which binds them as against strangers from the time of the writ being placed in the hands of the sheriff, a fact which a purchaser has no means of discovering, so that in this case also he may lose his money owing to the writ being delivered to the sheriff before, though the sale by the sheriff may take place after, the completion of the purchase.

The appointment of sequestrators is sometimes, though very rarely, used as final process on a judgment, in which case it may operate as delivery in execution so as to defeat a purchaser.

Receivers and sequestrators are more commonly appointed on interlocutory process, in which case a purchaser who completed after the appointment was made, though he would not necessarily lose his money, would be put to expense and delay before he obtained possession of the land.

It is impossible to estimate with any degree of accuracy what is the amount of risk run by a purchaser owing to the possibility of the land having been delivered in execution, or of a receiver or sequestrator having been appointed on interlocutory process, before completion. I am inclined to think that the risk is not very large, as none of the conveyancing text-books refer to it. Where the vendor is a wealthy man the risk, except as regards

the appointment on interlocutory process, is inappreciable, as it is hardly to be supposed that he will allow a creditor to recover judgment and to proceed to execution. On the other hand it must be remembered that the very fact of a man wishing to sell or mortgage his land is some evidence of his being in embarrassed circumstances. It is a matter of notoriety that landowners as a class are largely in debt, and that many of them are barely able to pay the interest on their mortgages: the consequence is that no prudent man will at present be willing to purchase or lend money on the security of land without satisfying himself that there is no risk of the landowner having an execution creditor.

Risks of the nature that I have described can easily be obviated by a slight change in the law. A provision that no land should be delivered in execution, and that no receiver or sequestrator should act, till the writ or order was registered, would be sufficient. H. W. E.

Codification in New York.—In this country it is possible to keep one's temper while discussing Codification. Indeed the difficulty here seems rather to lie in not keeping it, and the more ardent advocates of the science may be occasionally tempted to regret that the discussions it provokes are wholly destitute of the enlivening element of personal acrimony. In this they would be wrong, for the Legislature does, from time to time, though slowly, and as it would seem almost fortuitously, accomplish pieces of codificatory work. In New York it is very different. There Codes, in general and in particular, are belauded and denounced by rival champions with all the passionate fury which in England used to be the unvarying accompaniment of theological argument, and has now been transferred to the equally congenial field of scientific research.

In the April number of this Review (1886) notice was taken of a proposed Code of the New York Law of Evidence, proposed by the Hon. D. Dudley Field, and certain essential defects in its method and provisions were pointed out, in consequence of which a hope was expressed that it would be rejected by the Legislature of New York. This has since happened, but whether for the good reason that it was a bad Code, or for the bad reason that there ought to be no Codes, it would be rash to surmise. In either case one result has been a peculiarly animated attack upon Mr. Dudley Field, consisting of a pamphlet entitled 'Reply of Nathaniel C. Moak to Hon. David Dudley Field, relative to the Code of Evidence and Codification of Common Law.' This reply, and the documents which preceded it in the controversy, are worth reading in order to see that lawyers can get quite as angry with each other as any one else.

In the first place it seems that 'Gov. Hill asked the views of Mr. Moak, as he did that (*sic*) of other lawyers upon this Code.' Mr. Moak's reply was certainly not couched in a style likely to propitiate Mr. Field. He said: 'Having somewhat cursorily read some fifty [out of 224] sections of the "Code of Evidence," and examined such authorities as readily occurred to me as bearing upon them, it seems to me clear that it ought not to become law.' He then makes his objections to seventeen different provisions of the proposed Code, which he finally denounces, with lordly brevity, as 'clearly objectionable' and a 'decrepit statute.'

It is worth while to notice a few of Mr. Moak's objections to one or two provisions of the proposed Code which were the subjects of adverse comment in these pages six months ago. Mr. Moak takes exception to the provision that 'moral certainty only is required or that degree of proof which pro-

duces conviction in an unprejudiced mind.' This clause has at least six serious faults (see L. Q. R., April, 1886, p. 257) of which the principal one is that neither it, nor anything approaching to it, ought to be put into a Code at all. But none of them are pointed out by Mr. Moak. His objection to it is that 'moral certainty,' which absurd phrase he accepts as having some meaning, is not required, but only 'a preponderance of evidence,' which is an equally unscientific expression. He further asserts it to be the rule that in civil cases a party asserting that his opponent has committed a crime, is not obliged to prove it as conclusively as if the accused was being criminally tried for it, but that it is enough to satisfy the jury that his guilt is on the whole more probable than his innocence. If this is really the law of New York it must have been made so either by statute or by some decision in which the Common Law of England was treated with unusual contempt; and in either case it would seem to be a good thing to change it. Similarly Mr. Moak objects to the definition of 'direct evidence' not because he sees that, as there is no real distinction between 'direct' and 'indirect' evidence, there ought to be no such definition at all, but because he thinks he can make a better one. His criticism is that 'direct evidence may tend to prove a fact without doing so conclusively.' As he does not favour his readers with any further statement of what he understands the expression 'direct evidence' to mean, it is impossible to contradict him, but it would have been simpler and more satisfactory to point out the obvious truth that no statement can possibly 'prove the fact in dispute directly without an inference or presumption, and in itself, if true, conclusively establish that fact.'

After some three pages of criticism, more or less of this character, Mr. Moak winds up with the observation 'This Code being so clearly objectionable, it becomes unnecessary to determine whether or not codification of the subject be, in the abstract, desirable.' We are not told that Governor Hill had asked for Mr. Moak's determination whether Codification were, in the abstract, desirable, but the passage is worth noticing for the *animus* it shows, and because Mr. Field describes it as a 'fling' which 'might well have been omitted,' and which, though not necessarily indicating 'malignity,' was 'careless and flippant,' and showed a 'want of thought.'

These phrases occur in the following controversial piece, which is called 'Mr. Field's Reply to Mr. Moak's Reasons why the Code of Evidence should not become a Law.' Touching Mr. Moak's criticisms on particular sections, Mr. Field expresses a doubt whether the Governor wishes to hear 'a defence of these sections in detail,' but intimates that if he does, he will be 'ready to attend him with the necessary rows of books to show that' his 'statements were warranted.' Pending this complaisance on the part of the Governor, Mr. Field 'contents himself with observing' that Mr. Moak's criticisms appear to Mr. Field 'as full of "crudities, errors, and defects,"' as Mr. Field's Code appears to Mr. Moak. 'Indeed' Mr. Field thinks the said criticisms 'so hasty and puerile as to be unworthy of attention.' Secondly, says Mr. Field, Mr. Moak is not an impartial judge, because he writes law-books, and thinks a Code would interfere with their sale. Thirdly and fourthly, Mr. Moak, by his own account, only 'cursorily read some fifty sections,' and knows nothing about the other hundred and seventy sections, and has 'unwittingly presumed to weigh his judgment against that of hundreds and thousands of lawyers, many of them as good as he, in nine American Commonwealths, whose deliberate judgment has been formed from the study and experience of years, and in some instances a score of years.' Finally, Mr. Field condemns Mr. Moak, in a sentence of which the precise meaning is

not very clear to an English reader, 'to take his place with those malcontents who turn their backs upon the Constitution they are sworn to support, and strive to maintain that monopoly of legal knowledge which they hug to their bosoms as if it were their sole dependence in life.'

The controversy concludes (for the present) with the Reply of Nathaniel C. Moak to Hon. David Dudley Field, from which the pamphlet takes its title. The substantive part of it begins—'There are two periods in the life of every man when he is dogmatic and intolerant, and when he mistakes assertions and hard names for logic. You and I have passed the first. I have not, I hope, reached the second.' After this savage innuendo, Mr. Moak answers Mr. Field's points *seriatim*. First, as to the crudities, errors, and defects, he asks why Mr. Field did not specify what they were. But he does not in terms accept the awful challenge to appear with rows of books before Governor Hill—which it may be that Governor Hill does not regret. Secondly, he confesses that he has written law-books, but avoids Mr. Field's insinuation—which he calls a 'contemptible fling'—by the assertion that he was fortunate enough to be 'paid in full for each as completed.' Thirdly, he says that Mr. Field has used 'naughty names' instead of specifying errors; and fourthly, that he (Mr. Moak) presumed to weigh his judgment against that of the hundreds and thousands because he had a right to. In this plea most persons will concur. There are still a few things of our own with which we may do what we will, and our judgment is surely one of them.

Having thus said the last word, for the present, about Mr. Field's Evidence Code, Mr. Moak proceeds to devote some five pages to the denunciation of Codes in general. 'Now, Mr. Field,' he says, a little in the tone of a big boy about righteously to punch a little one's head, 'a word as to Codes. I am no Code hater; I confess I do not believe it possible to codify the Common Law. I have hitherto taken no part in the "code" wars except' to address a Committee of the Legislature for ten minutes against Mr. Field's Code. Mr. Moak then proceeds to charge Mr. Field with having said that Codes might be useful 'because one had been adopted in India, one in California, and because of the Code Napoleon.' If Mr. Field really urged that 'one' Code had been adopted in India, he was certainly guilty, though Mr. Moak does not expressly say so, of not making the best of his case, and he would at least have done well to specify which of the Indian Codes he referred to. In the determination of this point Mr. Moak's denunciation does not help us. He merely remarks that no trustworthy evidence as to the working of the one Code in India is available. '*Englishmen* tell us it works admirably. Unfortunately the two hundred millions of natives to whom it is administered are not heard from except as a few of them are occasionally blown from the mouth of a cannon.' Mr. Moak's reticence is cruel. Laymen generally, to say nothing of lawyers, would be really interested in 'hearing from' even a single native of Hindostan who had been occasionally blown from the mouth of a cannon.

Mr. Moak has two other arguments against Codes. One is that from 1777 to 1848 'in this state there was not a single impeachment of a judicial officer, and no inquiry as to the judicial conduct of one.' Then came Mr. Field's Code of Procedure, and 'within twenty-five years the avalanche of injunctions, writs, and orders, which were its legitimate growth, brought Barnard, Cardozo, Mr. Gunn, and possibly George W. Smith to disgrace, dismissal, and ruin. It resulted in charges against and investigations and trials of George M. Curtis, A. P. Smith, and Horace G. Prindle, and the consequent suspicion and lowering of the character of the judiciary.' English advo-

cates of codification may be unable to deny that the disgrace of judicial officers was the legitimate result of Mr. Field's Code, and equally unable to understand why it should be so, or whether it could be so unless the judicial officers deserved to be disgraced, in which case it was a very good thing, and Mr. Field's Code is to be congratulated. But it is clear that if and in so far as the result is a reproach to anything, it is a reproach not to Codes generally, but to Mr. Field's Code which wrought the havoc. The other argument is that Chief Justice Shaw once said in effect that the uncertainty of the Common Law with regard to states of fact which have not arisen, enables the judges when such facts do arise to hold that the law is what they think it ought to be, as for instance in determining the rights and liabilities of railway companies considered as common carriers. This is very true, but the real fact is that judges who declare the Common Law with regard to a state of facts which never existed before, are making new law. Now new Codes can be devised from time to time affecting new states of fact just as well as new judge-made law, and there is probably as much to be said for one way of legislating as for the other.

Mr. Moak winds up the controversy in a paragraph which begins thus: 'In conclusion, Mr. Field, I have no harsh words, no assertions and no ridicule for you, notwithstanding my conviction that you have so well ridden a pet hobby for years and desire the gratification of personal and family pride in being handed down to posterity as the Justinian of our age.'

I will not call you names, notwithstanding my conviction that you are a dogmatic, intolerant, vain, self-deluded old impostor. There is some fun in being an American jurist of this sort. Of course it is well known that American lawyers as a rule are not only as able but also as polite as English ones. But it must be entertaining to live in a country where any two persons can be found to discuss such a subject with such vivacity.

H. S.

Answer to the Real Property Puzzle, *ante*, p. 406.—A had two sons, B and C. B purchased land and died before 1834; on his death C took by descent as brother and heir. On C's death after 1833, A took as heir of the purchaser B, the fact that C left a son being immaterial. See 3 and 4 Will. IV, c. 106. H. W. E.

The following answer was given in a legal examination of a rather advanced standard lately held in England:—

'The rule against perpetuities (laid down in the Thellusson Act) is that income shall not be allowed to accumulate for a longer period than a term of 21 years added to the life of the grantor.

'The rule is rather different to that limiting contingent remainders, which must come within a period of an existing life, *plus* 21 years; and to that regarding executory interests, which must fall within any given number of existing lives *plus* 21 years. But all these are preceded by particular estates, generally beneficial. There is an exception to the rule against perpetuities in case of accumulations of income to pay off incumbrances.'

It seems to be believed by some students, indeed by some writers of books for students, that 'Jurisprudence' and Roman Law must be studied, but knowledge of the Law of Real Property comes by nature. The resulting estate of those who persistently act on this belief is not however generally beneficial.

Palaeography (writes a correspondent) is beyond the province of the Law Quarterly, but the question how records are best printed should be of some interest to those interested in the history of our law, and may, one hopes, be a practical question if the eighth centenary of Domesday is to be worthily kept. So it may be allowed me to suggest that the use of 'record type' (i.e. type imitating the stenographic signs used in MSS.), while it certainly deters readers, really saves very few mistakes. Sir Thomas Hardy, advocating its use, has given in the Preface to vol. iv of his edition of the Durham Register a large collection of blunders found in reputable works. Certainly these blunders are bad enough, but I think that any one who knows anything about the matter will see that only a very small percentage of them could have been saved by the use of record type. One can generally guess how the mistake has arisen. If an editor has printed *permitto* instead of *promitto* or *praemitto* we can say that his mistake probably lay in the deciphering of a stenographic sign. If, on the other hand, he gives *tam* where he should give *causa*, his mistake was one which no typographical device could have prevented; he has read *t* instead of *c*. Here is the beginning of Hardy's catalogue of errors:—*mutuo* for *invicem*, *intimationem* for *insinuationem*, *unum* for *vestri*, *avisimus* for *amisimus*, *fratris* for *patris*, *inde* for *vi*, *instrueret* for *visitet*, *laborare* for *liberare*, *serenitas* for *strenuitas*, *simul* for *similiter*, *subscripta* for *subsequentia*, *inveniemus* for *iniunximus*. I do not believe that we should have been spared any of these errors had the editor had at his command the most elaborate type. The most common source of misreadings is the likeness between *u* and *n*, and between *ui*, *ni*, *iu*, *ui* and *m*; hence such blunders as *iudiciis* for *indiciis*, *ineundis* for *uniendis*. The resemblance between *c* and *t* again is very fatal. A lady's reputation may depend on a difficult choice between *amita* and *amica*. In such cases record type is of no service at all. In general the stenographic signs are the very easiest things to read and to understand, and if one cannot expand them correctly then one cannot be trusted to copy them correctly. Take the common abbreviation of *persona*; one meets a *p* surmounted by a little *a* and with a line drawn through its tail; the man who does not happen to know what this means will probably think that the *p* is not a *p*. My belief is that record type saves an inconsiderable number of mistakes at the cost of driving away students who want legible books and not displays of pothooks and hangers. Those valuable Rotuli Curiae Regis which Sir Francis Palgrave edited would, I am persuaded, have been much better known and much more highly prized than they are, had that learned man printed all the words in full, a task which he could easily have done with great safety. There are just a few documents which deserve to be photographed, but between photography and common type there is no logical resting-place.

The following entry upon the Coram Rege Roll for the 21st year of Henry the Third (A.D. 1236–7) forms a pendant to the story of the Deacon and the Jewess discussed in the April number of this REVIEW. The Roll itself is not now to be found, but excerpts from it are contained in a MS. at the British Museum (MS. Add. 12,269, f. 174 dors.), and among them this:—

Cressant de Stampes Judeus Bristollii diffamatus est quod Ysobella filia Giliberti Sellar' Cristiana inuenta fuit cum eo in lecto et concubuit cum ea, et alias diffamatus fuit de eodem crimine. Abiurauit regnum et elegit portum Shorham et habet spacium transfretandi a tali die in unum

mensem. Et eadem Ysobella cepit penitenciam suam et abiurauit villam Bristollii, etc.

Fornication between Jew and Christian seems clearly to have been treated as an offence cognizable by the lay court; though what would have been done to the Jew if he had not abjured the realm does not appear. F. W. M.

'Domicil' as a Legal Expression.—One piece of advice may be confidently given to Parliamentary draftsmen: they should never make use of the word 'domicil.' It is one of those technical terms which has accumulated around it a lot of very misty theory, and has therefore become a matter full of obscurity. Any person acquainted with the particular topic knew that Order XI. r. 1 (c) and (e) was certain, just because it used the term a 'person domiciled,' to give work for the lawyers. The expectation is amply justified by *Jones* v. *The Scottish Accident Company*, 17 Q. B. D. 421. The case brought up the question which may give rise to any amount of speculative discussion, What is the domicil of a company? The Court sensibly decided that a company's domicil is its principal place of business, but the problem how to apply one of the most artificial of legal notions to an artificial being which is wholly the creation of law is in itself complex and may yet give rise to difficulty. We again repeat our advice to draftsmen—avoid the use of the term domicil.

Where a partnership is continued by tacit agreement after the expiration of the specified term, the tendency of our Courts has been to hold the continuance to be, so far as possible, on the same terms, and to refuse to give effect to such clauses only as are manifestly inconsistent with the partnership being determinable at will. The decision of the House of Lords in the Scottish appeal of *Neilson* v. *Mossend Iron Company*, 11 App. Ca. 298, may seem at first sight to give a check to this tendency. If so, we should regret the result as tending to defeat the real intention of parties and create opportunities for sharp practice. But careful examination will show that the language of the clause in question was peculiarly strict and limited, and that on those words no other decision could have been arrived at without doing violence to their plain and primary sense.

The Employers' Liability Act, 1880, has been useful as a provisional mitigation of harsh and non-natural conclusions of law, but it has certainly made the law more difficult to understand. In *Thomas* v. *Quartermaine*, 17 Q. B. D. 414, the real question was whether the plaintiff would have had any cause of action if, instead of being a workman, he had been in the defendant's brewery in the exercise of an independent right, or—in the technical sense explained in *Indermaur* v. *Dames*—by the defendant's invitation. This by no means escaped the Court (see per Grantham J. at p. 420), but the involved structure of the Act is nevertheless in the nature of a trap for suitors, if not for judges. We note that Wills J. seems to accept the extra-judicial remarks of Lord Bramwell printed in an appendix to the second edition of Mr. Horace Smith's book on Negligence. But Mr. Horace Smith distinctly does not accept them, for reasons which in our opinion are good and sufficient.

The Committee on Correspondence of the Alabama State Bar Association has issued a circular letter to the Bar Associations of other States, urging

the importance of establishing a uniform system of commercial law, suggesting the recommendation to the several State Legislatures of the English Bills of Exchange Act, 1882, and adopting the argument of Judge Chalmers, published in the present volume of this REVIEW, for codification of the Common Law on this and kindred subjects.

Draycott v. *Harrison*, 17 Q. B. D. 147, illustrates the peculiar position occupied by a married woman under the Married Women's Property Act, 1882, and though it will be no surprise to lawyers, may perplex and annoy tradesmen and other laymen. The popular impression is that a married woman can now contract in the same way as a *feme sole*. This impression is ill-founded: she can contract only in respect of her separate property; in other words, she cannot render herself personally liable for a debt, nor can she bind any part of her separate estate which is subject to a restraint upon anticipation. Hence where *X*, a married woman, is found to have property of about £180 a year, but her estate was subject to a restraint upon anticipation and *X* has actually received part of her income, a County Court judge has no power on a judgment against her and her husband to make an order of committal against her for default of payment under the Debtors Act, 1869, sec. 5.

Seroka v. *Kattenburg*, 17 Q. B. D. 177. If a married woman under the present state of the law escapes from some of the contractual liabilities of a *feme sole*, *Seroka* v. *Kattenburg* shows that, as Mr. Justice Mathew puts it, the Act of 1882 is not an Act for the relief of husbands, and that a husband is still liable to be joined with his wife in an action for a wrong committed by her during coverture. He is therefore responsible among other things for a libel published by his wife, even though he takes no part in the publication. That the decision of the Court is right is, in our judgment, pretty clear. What is not at all clear is that the law itself is right. The Married Women's Property Acts from the first to the last mark a transition from the ancient to the modern view of the position of a *feme coverte*. But as far as law is concerned the change from the old to the new stage of opinion is not complete. What is needed is, as we have before suggested, that a *feme sole* should now, except in one or two definite cases, be placed exactly in the same position both as to rights and as to liabilities as an unmarried woman. This is what we must come to at last, and to carry the law out to its logical result will shorten the Statute Book, put an end to a good number of appeals to the Courts, and prevent no small amount of injustice.

Abrath v. *The North Eastern Railway Company*, 11 App. Cas. 247, contains a statement of opinion by Lord Bramwell which will excite a good deal of attention and of criticism.

His lordship lays down in the plainest and most vigorous language an extremely characteristic and, we must add, extremely startling doctrine. The dogma is this; that 'no action for malicious prosecution will lie against a corporation.' 'If the whole body of shareholders' [in a company] 'were,' says Lord Bramwell, 'to meet and in so many words to say "prosecute so-and-so not because we believe him guilty, but because it will be for our interest to do it," no action would lie against the corporation though it would lie against the shareholders. . . . If the directors even by resolution at their Board, or by order under the common seal of the Company (I am

putting the case plainly in order that there may be no mistake about it), were maliciously, with a view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive no action would lie against the corporation, because the act on the part of the directors would be *ultra vires*; they would have no authority to do it. They are only agents of the Company; the Company acts by them, and they have no authority to bind the Company by ordering a malicious prosecution.'

This is the doctrine laid down by his lordship in a case which could be decided, and was in effect decided by the House of Lords without the maintenance of any such broad and sweeping view as is enounced by Lord Bramwell. The ground of his opinion (for however eminent his lordship, it is an opinion and nothing more) is the very intelligible one that malice or improper motive is necessary to constitute malicious prosecution, and that 'a corporation is incapable either of malice or of motive.'

Now we will not undertake positively to assert that his lordship's opinion is erroneous, but we do assert with confidence that it is open to some obvious objections which Lord Bramwell has not met. They are these:—

First, his dogma is very hard to reconcile with decided cases. A corporation is liable for libels, frauds, acts of negligence committed by its servants in the course of their employment (*Barwick* v. *The English Joint Stock Bank*, L. R., 2 Ex. 265, 267). But if a corporation is capable of fraud, why is it not capable of malice?

Secondly, the assertion that a corporation is incapable of motive is of course in one sense true, for a corporation as such is incapable of any mental act whatever, and if incapable of 'motive' is also incapable of intention, and on this showing no corporation could do any legal act whatever, e. g., make a contract.

Thirdly, the real test of liability would seem to be whether the wrongful act of whatever nature is done by the agents of the corporation acting in the course of their business as such, and with the purpose of serving its interest. If it is so done, the corporation is liable for it whether the act be fraudulent or malicious.

Fourthly, no corporation is by the terms of its constitution authorised to do illegal or wrongful acts. When therefore its servants do such acts they always in one sense act without authority. The argument therefore relied upon Lord Bramwell suggests the conclusion that corporations are never liable for the wrongful acts of their servants; or, to put the thing more generally, that employers are not liable for the wrongful or negligent acts of their servants, unless these acts are expressly or impliedly sanctioned by the employers, and to this conclusion we suspect Lord Bramwell would, as a jurist, assent. But then this conclusion is distinctly not supported by the law of England. The law of England as to the indirect liability of employers may be wrong, but a judge, however eminent, must admit and act upon not only the principles of law but also fair deductions from these principles.

Fifthly, the doctrine that a corporation cannot be liable for malicious acts because it is incapable of malicious motives derives its plausibility from overstraining a legal fiction beyond the limit within which it is alone useful. A corporation may logically be distinguished from the persons who constitute it, but the plain truth is that it does consist of persons. There is much truth in Lord Fitzgerald's remark, 'I have often heard it observed that they certainly are very frequently without conscience, and sometimes very malicious.' Irish humour is occasionally more sensible than English common sense.

In *Lee* v. *Abdy*, 17 Q. B. D. 309, is raised a curious point of (so-called) private international law. An English insurance company grants a policy of life assurance to *M*. *M*, when in the Cape Colony, assigns the policy to *A*. His wife *A* at the time of the assignment, and till his death, is domiciled in Cape Colony. Under the law of the Cape Colony, the assignment is void by reason of the relationship between the parties. On *M*'s death, *A* sues the company on the policy. The company plead that the assignment is void under Cape law, and that therefore no action is maintainable by *A*. The Court, consisting of Day & Wills, JJ., hold that the defence is good, or, in other words, that the validity of the assignment must be determined by reference to the law of the Cape.

There is some difficulty in reconciling this decision with *Lebel* v. *Tucker*, L. R., 3 Q. B. 77, which itself is a little difficult to reconcile with *Bradlaugh* v. *De Rin*, L. R., 3 C. P. 538. On the whole it appears that on the state of the authorities the right way to consider the judgment in *Lee* v. *Abdy*, is to look at the case as one to be decided as though it were *res integra* determinable solely on principle.

On this view of the matter we hold, though not without hesitation, that the judgment of the Court is right.

The general principle which lies at the bottom of at least half the rules as to the conflict of laws is that a right duly acquired under the law of one country must be enforced in other countries in accordance with that law, and that a right which if acquired at all must be acquired under the law of a given country is not enforceable in any country if the right is invalid, i. e. not recognised by the law of the country where (if at all) it is acquired.

Applying this rule to *Lee* v. *Abdy*, it appears to follow that the right of *A*, the assignee, was, if it existed at all, a right given by the law of the Cape; it depended not upon the original contract, which was made in England, but upon the assignment which took place at the Cape, and under the law of the Cape. But the law of the Colony made the assignment void, i. e. gave *A* no rights under it. *A* therefore had no right which she could maintain either in the Cape courts or before any other tribunal.

It is worth notice that the difficulty presented by this case and by others arises from the fact that the Courts of England determine rights in reference to foreign law on two quite different grounds, which are not always distinguished either by text-writers or by Judges. The one ground is that a right is conferred upon *A* by the law of some foreign country; it is a foreign right which he is allowed to enforce in an English Court. This is the case when *A*, a French creditor, sues *X*, a French debtor, in an English Court for a debt alleged to be incurred by *X* to *A* at Paris. When the right is acquired, if at all, strictly under foreign law, then it cannot be enforced in England, except in so far as the foreign law recognises it. The second and other ground is, that a right acquired under English law may be measured by the rules of foreign law; when this is so, the right is an English and not a foreign right. Thus if *X*, a domiciled Englishman, were to provide by a will made in England, according to English forms, that his money should be divided among his children as far as possible in accordance with the rules laid down by the Code Napoleon, the will could not be interpreted without reference to the Code, the terms of which would fix the limits of the rights possessed by each child of *X*'s. But the rights would be rights acquired under English law; they could not be enforced if they contravened that law, nor would they cease to be enforceable even if before *X*'s death the Code ceased to be the law of France. The matter in fact in dispute in *Lee* v.

Abdy and like cases is whether the right on which reliance is placed is given, or is only regulated by foreign law. The distinction is not always easy of application, but it is important, and in *Lee* v. *Abdy* has been, it is submitted, rightly applied.

In *In re Armstrong, Ex parte Gilchrist* (34 W. R. 709) a married woman had a general power of appointment over property exercisable by deed or will with a gift over in default of appointment. She carried on a business separately from her husband (after the date of the Married Women's Property Act 1882), and became bankrupt. In such a case s. 1 (5) of the Married Women's Property Act 1882 provides that the married woman 'shall *in respect of her separate property* be subject to the bankruptcy laws in the same way as if she were a *feme sole*.' The trustee in bankruptcy accordingly applied to the Court under s. 24 of the Bankruptcy Act 1883 for an order directing the married woman to exercise the power in his favour for the benefit of the creditors. The point was thus raised; whether such a power of appointment, which in the case of a man at all events is made property by s. 44 (iii) of the Bankruptcy Act 1883, is separate property within the meaning of the Married Women's Property Act 1882. The Court of Appeal (reversing Cave J.) held that it was not. A general power of appointment by deed or will giving as it does the absolute dominion is, as was said by James L.J. and Jessel M.R. in *Re Van Hagan* (16 Ch. D. 18), equivalent for almost all purposes to property: it is not however strictly property, but a means of acquiring it. The distinction is well illustrated in the analogous case of a person possessed of such a power dying insolvent. If the donee of the power has exercised it and by so doing made the property his own, it becomes assets for the creditors of the estate; if the donee has not exercised it, it belongs to the persons entitled in default of appointment and is not assets.

Any obscurity as to the principle which should guide the Court in granting or refusing a new trial on the ground of the verdict being against the weight of evidence, has been cleared away by the recent cases of *The Metropolitan Railway Company* v. *Wright* (11 App. Cas. 152) and *Webster* v. *Friedberg* (55 L. J. Q. B. 403). In *Solomon* v. *Bitton* (8 Q. B. D. 176) Jessel M.R. is reported to have said that the question in granting a new trial in such a case should depend on whether the verdict was such as 'reasonable men ought to have come to.' Criticising the use of the word 'ought,' Lord Halsbury in *Metropolitan Railway Company* v. *Wright* justly observes that it implies that the Court 'must form and act upon their own view of what the evidence in their judgment proves,' and he lays down the true principle as being that if reasonable men *might* find the verdict which has been found the Court has no jurisdiction to disturb it. It now appears from the case of *Webster* v. *Friedberg* that Jessel M.R. was not correctly reported, and that what he really said, as he himself told Fry L.J., was that the granting a new trial in such a case should depend on the question whether the verdict was such as reasonable men ought *not* to have come to. This puts a different complexion on the case, and brings it into substantial accord with the criterion adopted by Lord Halsbury.

Bunch v. *The Great Western Railway Company* (17 Q. B. D. 215) is an instance, as Lindley L.J. observed, of the struggle which is going on day by day between railway companies and the public as to the responsibility for luggage. Very briefly the facts were these. On a passenger's arrival on

Christmas Eve at a station with luggage including a bag a porter took the luggage to be labelled. The passenger told him she wanted the bag to be put in the train, i.e. the carriage, and asked if it would be safe to leave it with him. The porter replied that it would. The passenger then went to get a ticket and meet her husband, and on her return ten minutes afterwards the bag was missing. The case turned on the true view to be taken of these facts, viz. whether the proper inference was that the bag was in process of transit during the time it was in charge of the porter or whether the transit was during that interval suspended. Lord Esher and Lindley L.J. were of opinion that the bag was in transit, and the delay not unreasonably long. Lopes L.J. differed: it was no part he thought of the employment of an ordinary porter to take charge of luggage beyond the time reasonably necessary for its transit, and this would not include time during which the passenger is otherwise employed for his own convenience, as happened in a recent case of *Welch* v. *London & North Western Railway Company* (34 W. R. 166), where a passenger who had missed his train gave his luggage to a porter to look after until the next train and went to the billiard room of the station hotel, and the Court held, on the loss of the luggage, that the delivery was for the purpose of warehousing and not of transit. The legal principles involved are discussed elsewhere in this Number.

In *Reg.* v. *Essex* (55 L. J. Q. B. 313) a local board under the powers of an Act of Parliament incorporating the Land Clauses Act took land belonging to *E.* for the purpose of a sewage farm, and a jury called to assess the compensation sympathetically awarded *E.*, in addition to the purchase money of £8000, £4000 in respect of other land belonging to him being 'injuriously affected' by the works. The other land in question adjoined but did not touch the land taken as in the Stockport Case (33 L. J. Q. B. 251). The Court of Appeal had therefore no difficulty in distinguishing that case, in which there had been severance, from the case before it. In doing so Lindley L.J. doubted very much whether the Stockport Case was good law, and Lord Esher said he was prepared, if he were a member of a competent tribunal, to overrule it.

Blackburn Low & Co. v. *Vigors* (55 L. J. Q. B. 347) raised an important question of marine insurance law. As stated in the judgment of Lopes L.J. it was this. If an agent employed to effect an insurance purposely omits to communicate material facts which come to his knowledge during his employment (facts which it was his duty to communicate to his principal), is this a concealment which will vitiate an insurance effected by the innocent principal through another agent ignorant of any such concealment? The Court of appeal, Lindley and Lopes L. JJ., Lord Esher dissenting, decided that upon the authorities *Fitzherbert* v. *Mather* (1 T. R. 12), *Gladstone* v. *King* (1 M. & S. 35), and *Proudfoot* v. *Montefiore* (L. R., 2 Q. B. 511) it did. The *ratio decidendi* was that stated by Cockburn C.J. in the last case, viz., that the 'insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has or in the ordinary course of business *ought* to have knowledge, and that the latter will take the necessary measures by the employment of competent and honest agents to obtain through the ordinary channels of intelligence in the mercantile world all due information as to the subject-matter of the insurance.'

In *Hamilton* v. *The Thames & Mersey Marine Insurance Co.* (17 Q. B. D. 195), which raised another question of marine insurance law, Lord Esher was again dissenting from the judgment of the Court. A steamer in this case was insured by a policy on the ship and machinery in the usual form against 'perils of the seas, men of war, fire etc., . . . and all other perils, losses and misfortunes that have or shall come to the hurt, detriment, and damage of the aforesaid subject-matter of this insurance.' A donkey engine was used to pump water into the boilers of the steamer, but owing to the valve which communicated with the boilers being closed the water was forced into the engine and burst it. The majority of the Court held that the loss was covered by the policy. Such an accident was not indeed strictly a peril of the seas, but it was *ejusdem generis* with perils of the seas and covered by the concluding words of the clause. In *West India Telegraph Co.* v. *Home & Colonial Insurance Co.* (6 Q. B. D. 51) Selborne C. and Cockburn C.J. held that a policy in similar terms covered the bursting of a boiler. 'What the winds are to a sailing vessel,' said Lord Selborne, 'steam is to a steamer, and it is as reasonable that marine insurers should bear the risks incident to a navigation by that kind of power, whether from excess of pressure in the boiler or from defects of safety valves . . , as that they should bear losses occasioned by excessive pressure of wind and defects or mismanagement of a ship's sails or tackle.' The general words in such a clause will cover 'all losses incident to the navigation of a vessel during the voyage, inclusive of losses arising from negligence or improper management.'

In *Walsh* v. *Lonsdale* (21 Ch. D. 44) the late Master of the Rolls laid down the principle that a tenant who is in possession under an agreement for a lease holds since the Judicature Act under the same terms in equity as if a lease had been granted, adding with his usual exactness, 'it being a case in which relief is capable of being given by specific performance.' The propriety of this qualification was shown in the case of *Coatsworth* v. *Johnson* (54 L. T. R. 520), where a tenant holding under an agreement for a lease committed various breaches of the covenants contained in the draft lease and then tried to shelter himself under s. 14 of the Conveyancing Act 1881 (giving relief against forfeiture for breach of covenant in a lease). The Court held that he had by his acts disentitled himself to claim specific performance, for the Court would not, as was said in *Gregory* v. *Wilson* (9 Hare, 683, 687), compel a grant of that which if already granted would have been forfeited, and s. 14 of the Conveyancing Act could not help him for it was limited to leases.

Two important points were decided by the House of Lords in *Colonial Bank* v. *Whinney* (34 W. R. 705). The first concerned the doctrine of reputed ownership. T. & Co., a firm of stockbrokers, being the registered holders of certain railway shares, deposited the share certificates with their bankers to secure an advance. The certificates contained the usual note that in the event of sale or transmission the certificates must be surrendered. The firm became bankrupt, and the trustee in bankruptcy claimed the shares under s. 44 (iii) of the Bankruptcy Act as being in the order and disposition of the bankrupts by the consent and permission of the true owner under such circumstances that they were the reputed owners thereof. The test applied by the House of Lords was, Could the bankrupts have sold the shares or obtained credit on them in the course of their trade or business? It was clear that they could not. The case of *Société Générale de Paris* v. *Walker* (11 App. Cas.

20) decided that a transfer of shares unaccompanied by the certificates would not be 'in order' and would not be registered by the company. 'Any one,' said Lord Blackburn, 'who was about to give credit to the bankrupts as being the owners of the entire interest in those shares ought to know that he had no legitimate ground for believing that they were such owners of the whole interest unless the certificates were produced or accounted for. I think therefore that the circumstances were such as to prove that the bankrupts were not reputed owners of the interest of the bank in the shares.' The second point decided was that railway shares are choses in action. Elementary as the term 'choses in action' is in our law, a certain nebulousness has hitherto hung over it, evidenced by the difference of judicial opinion in the Court of Appeal. The term is not restricted, as Cotton and Lindley L.JJ. thought it was, to the right to sue for a debt or damages, but comprehends all chattels personal that are not in possession as distinguished from chattels personal which are in possession and pass by delivery, e.g. such things as may be the subject of larceny at Common Law or may be seized by the sheriff under a *fi. fa.*

In *Keyse* v. *Keyse & Maxwell* (11 P. D. 100) Sir James Hannen made some useful observations to the jury to guide them in assessing damages (if any) against the co-respondent in the suit. 'First,' said the learned judge, 'you must remember that you are not here to punish at all. . . . . All that the law permits a jury to give is compensation for the loss which the husband has sustained. That is the only guide to the amount of damages to be given.' In estimating this loss the jury must consider how far it has been caused by the action of the co-respondent, whether for example he has seduced his wife away from her husband and her home, and how far it has been caused or contributed to by the husband himself neglecting his wife after they have quarrelled and parted, and thereby abandoning her to the temptation to which he knows she must yield of securing support from some other man. The only question being what damage the petitioner has sustained, it is entirely irrelevant for the purpose of assessing such damage whether the co-respondent is a rich man or a poor man.

Clarke v. *Milwall Dock Company* (55 L. J. Q. B. 378) is an illustration of the hardship not unfrequently worked by the law of distress. A ship was being built by a shipbuilder for a customer under a contract which provided for payment of the purchase money by instalments as the work proceeded. Before the ship was finished it was seized under a distress for rent levied by the shipbuilder's landlord. It was contended on behalf of the customer that the case came within the rule exempting from distress 'things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ;' but the Court of Appeal held that there had been no *delivery* to satisfy the rule, and that the ship was not protected.

In *Miles* v. *The New Zealand Alford Estate Company* (32 Ch. D. 266) the Court of Appeal decided that the abandonment of a serious claim honestly made is a good consideration for a contract, though it afterwards turns out that the claim was an unfounded one. This is no new law: it had been enunciated in *Cook* v. *Wright* (1 B. & S. 559), and reaffirmed in *Callisher* v. *Bischoffsheim* (L. R., 5 Q. B. 449) and *Ockford* v. *Barelli* (L. R., 20 W. R. 116), but some doubt was thrown upon those cases by the observations of Lord Esher, *Ex parte Banner* (17 Ch. D. 480), who seems to have thought that for

forbearance to sue to constitute a good consideration it was necessary not only that the claimant should believe that he has a good cause of action, but that the claim should be a really doubtful one. From this view the Court of Appeal dissented, and the older authorities remain unshaken.

Seath v. *Moore* (11 App. Cas. 350) was a case of Scotch law raising the question whether a ship which was being built for a customer on the terms of payment by instalments at certain stages was 'sold' within the meaning of the Mercantile Law Amendment (Scotland) Act so as to be protected against the shipbuilder's creditors, but it led to some important observations by Lord Blackburn and Lord Watson as to the time at which the property in a ship so in building or other *corpus manufactum* passes to the purchaser. In each case it is of course a question of the construction of the contract at what stage the property shall pass; but according to Lord Watson, the result of the English authorities, *Woods* v. *Russell* (5 B. & Al. 942), *Clarke* v. *Spence* (4 Ad. & E. 448), and *Wood* v. *Bell* (5 E. & B. 772, 6 E. & B. 355), is that an agreement that a ship or other *corpus manufactum* shall be appropriated to the contract of sale 'ought, in the absence of any circumstances pointing to a different conclusion, to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser or some one on his behalf, but such an inspection must be sufficient to warrant the inference that the purchaser has agreed to accept the *corpus* so far as completed as in part implement of the contract of sale.' Another principle deducible from the same authorities is that 'materials provided by the builder and intended to be used in the execution of the contract are not appropriated to the contract unless they have been affixed to or made part of the *corpus*.'

The rule which treats children born of a marriage in contemplation of which a settlement has been executed as quasi parties to the settlement and permits them to sue for the execution of the trusts of the settlement does not apply, so the case of *Green* v. *Paterson* (32 Ch. D. 95) decides, to a post-nuptial settlement, the children in such a case not being within the consideration of the settlement or parties to the contract. The point is new to our Courts, but it seems to have been so decided in 1860 in a case of *Joyce* v. *Hatton* (11 Ir. Ch. R. 123, 130) before the Irish Master of the Rolls.

In *Studdert* v. *Grosvenor* (34 W. R. 754) Kay J. decided that it was not *ultra vires* for directors of a company (a co-operative society) to spend the funds of the company in prosecuting a libel which was injurious to the interests of the company, but that it was *ultra vires* to spend the funds of the company in prosecuting a libel which imputed corrupt dealing to the directors, though such imputations were incidentally injurious to the company. In taking this rather refined distinction the learned Judge seems to have relied on *Kanaghan* v. *Williams* (L. R., 6 Eq. 228) and *Pickering* v. *Stephenson* (L. R., 14 Eq. 322), but the proceedings there were by some shareholders against others, and all that Wickens V.C. decided was that in such a contest to use the funds of the company to assist one side against the other was *ultra vires*.

On another point raised in *Studdert* v. *Grosvenor*, Kay J. expressed a very strong opinion. The directors of the company had sent stamped proxy forms to the shareholders filled in with the name of one of the directors and paid

for out of the funds of the company. Such a proceeding was said to be sanctioned by custom, but the learned Judge held that it was not only an improper proceeding as being calculated to give the directors the control of meetings, but as an expenditure no less *ultra vires* than providing an indolent shareholder with post-horses or a special train.

Lord Justice Lopes' view of rats in a cargo-carrying ship as an unavoidable evil of navigation, and therefore 'a peril of the seas' within the meaning of the ordinary charter-party clause (*Pandorf* v. *Hamilton*, 16 Q. B. D. 629), is it appears erroneous. Rats constitute—so the Court of Appeal in an elaborate judgment have now decided—a vice or defect in a ship for which the shipowners are responsible. As a rule they can be kept out of ships which are fit to carry cargo, but even if it were proved to be impossible to exclude them, a ship with rats on board her that receives goods into her hold ought semble to bear the responsibility for all damage done to the goods by the rats. A passage was cited from Roccas stating that the keeping cats on board excused the shipowner from damage by rats, but even this useful suggestion could not be relied on by shipowners towards whom as common carriers the law of England is, as the Court observed, less indulgent than the Roman law or the law of many continental nations.

In *Howard* v. *The Refuge Friendly Society* (54 L. T. R. 644) a son insured his father's life. He had no insurable interest in the life. Mathew J. held the policy void as a contract by way of gaming or wagering, each premium paid constituting a bet on the assured surviving the period for which the premium was paid.

Coaks v. *Boswell* (11 App. Cas. 232) is noticeable for the observations made by Lord Selborne as to the duty of disclosure by a purchaser of property sold under the direction of the Court. The Court of Appeal had laid it down that a person so buying must either abstain from laying any information before the Court in order to obtain its approval, or must lay before it all the information he possesses which is material to enable the Court to form a judgment on the matter. This, Lord Selborne said, was stating the principle too broadly. A purchaser from the Court is in no different position from an ordinary purchaser. Like an ordinary purchaser he is bound to abstain from all deceit whether by suppression of truth or suggestion of falsehood, but he is under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest; no deceit can be implied from his mere silence as to such facts unless he undertakes or professes to communicate them. This however he may be held to do if he makes some other communication which without the addition of those facts would be necessarily or naturally and probably misleading. The protracted litigation in *Coaks* v. *Boswell*, though it ended in the purchasing solicitor being entirely exonerated, illustrates very forcibly the inconveniences which may result from a solicitor in an administration action obtaining leave to bid for property sold in the action under the direction of the Court.

In *In re Wood, Ward* v. *Wood* (32 Ch. D. 517), the Court (North J.) had to consider the effect of an erroneous recital in a will. The will in question recited that the testator had advanced to his four sons certain specified amounts on account of their respective shares and that the 'respective sums herein-

before recited to have been advanced' should be brought into hotch-pot by the four sons respectively. The sons asked to be allowed to adduce evidence to show that no advances or advances only of smaller amount had been made to them, but the learned Judge, following *In re Aird's Estate* (12 Ch. D. 291), held that the recital even if erroneous was binding on the legatees, merely observing that if there had been a mistake in the will as to the amounts of the advances, so much the worse for the persons to whom the gifts were made. *In re Aird's Estate* was not followed by the Court of Appeal in *In re Taylor's Estate* (22 Ch. D. 495), but the learned judge distinguished the latter case on the ground that it was decided on the very special words of the will and codicil.

Reg. v. *Latimer* (17 Q. B. D. 359) settles that a person may be convicted of a malicious wounding within the meaning of s. 20 of 24 & 25 Vict. c. 100, if in striking the blow he had malice against somebody though none against the person injured. The only difficulty in the case was caused by *Reg.* v. *Pembliton* (L. R., 2 Cr. Cas. R. 119), where a person maliciously throwing a stone at another accidentally broke a window and was held not to have been guilty of a malicious injury to property; but *Reg.* v. *Pembliton* was decided on the special words of a statute constituting a different class of offence, and the Court had no difficulty in distinguishing it. Questions of this kind have given abundant exercise to Continental writers on the theory of criminal responsibility. The comparatively rough methods of our own criminal jurisprudence are perhaps sufficient for the common purposes of justice.

In *In re Cleaver, Ex parte Consolidated Credit Corporation* (34 W. R. 760) Cave J. spoke of the Bills of Sale Act 1882 as a 'well-meant but unfortunate attempt of the Legislature to prescribe the form in which bills of sale should be drawn, while it invited by the terms of the Act the insertion of further terms. . . *It is a mistake*,' added the learned judge, '*to try and force business transactions into a certain form instead of stating and applying principles*.' These remarks are amply justified by the crop of litigation which the Act has caused. Its sections recall the lines of a very original but little-known poet, Matthew Green, in his poem on the 'Spleen:'—

> 'Law grown a forest where perplex
> The byeways and the brambles vex;
> Where the twelve verderers every day
> Are changing still the public way.
> And if we lose our way and err,
> We grievous penalties incur;
> And wanderers tire and tear their skin,
> And then get out where they got in.'

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(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

The English Historical Review. Edited by the Rev. M. Creighton. No. 3, July, 1886. London: Longmans, Green & Co.

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No. 355. The Growth of Law, No. V—Technical Objections and Escapes from Justice, No. XV—The Mutual Rights and Duties of the Bench and Bar—Book Reviews—Notes—Notes of Cases.

No. 356. 'La Ligue Ancienne:' Its political character—Notes in the Inner House—Technical Objections and Escapes from Justice, No. XVI (concluded)—Repairs under Leases—Book Review—Notes—Notes of Cases, etc.

No. 357. 'La Ligue Ancienne:' Its influence on the Substantive Law of Scotland—The International Copyright Union—The Milnathort Murder, No. I—Previous Convictions—Notes in the Inner House—Notes of Cases, English and Foreign.

The articles on 'The Origin and History of the High Court of Justiciary' are continued in these numbers.

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No. 19. Cursory Remarks on Professional and Judiciary Reforms—Registration of Wills—The Clause of Submission in Contracts, No. II—Proposed Amendment of the Employers' Liability Act—Report of Annual Meeting of Incorporated Society of Law-Agents in Scotland—Notes—Reports.

No. 20. Notes from Edinburgh—Reviews (including a notice of Sheriff Dove Wilson's article on the 'Unification of the Law of Bills of Exchange' in the July number of this REVIEW)—Current Notes—Reports.

No. 21. A proposed Small Debt Bill (Sheriff Lees)—Law Reform in Ireland—Reports.

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Il Filangieri: Rivista Giuridica Italiana di Scienza, Legislazione e Giurisprudenza. Anno XI. Part I, Nos. 5–7, May, June and July, 1886. Milan.

No. 5. Studio critico sulla premeditazione (Masucci)—Della interruzione naturale del possesso (Ciaburri)—Studi di legislazione economica, sociale ed internazionale: continued from the March number (Rabbeno)—Il contratto di commenda nella storia del diritto italiano (Ciccaglione)—Reviews.

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